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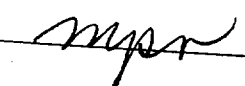
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EASTERN DISTRICT
OF TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS

AUG 11 2003

DAVID J. MALAND, CLERK
BY
DEPUTY 

SCOTT O'GRADY,

Plaintiff,

v.

TWENTIETH CENTURY FOX
FILM CORPORATION and
DISCOVERY COMMUNICATIONS, INC.,

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CIVIL ACTION NO. 502CV173

**DEFENDANT TWENTIETH CENTURY FOX FILM CORPORATION'S
OBJECTIONS TO PLAINTIFF'S SUMMARY JUDGMENT EVIDENCE,
AND REQUEST FOR RULING THEREON**

Defendant Twentieth Century Fox Film Corporation ("Fox Film") files the following objections to certain evidence contained in the Appendix to Plaintiff Scott O'Grady's Response in Opposition to Defendants Twentieth Century Fox Film Corporation's and Discovery Communications, Inc.'s Motions for Summary Judgment and Brief in Support (the "Appendix"), and in support thereof would show the Court as follows:

I. OBJECTIONS

1. **Exhibit 5:** Fox objects to the Gelb Report and Survey for failure to implement and maintain "standards and controls" that would support the reliability of the survey utilized by Gelb in reaching his opinions as required by Fed. R. Civ. Evid. 702. Fox attacks the methods utilized by Gelb in constructing and conducting the survey, and thus Fox challenges the reliability of the results and Gelb's opinions based on those results. O'Grady, as the party seeking to have the district court admit expert testimony, must demonstrate that Gelb's findings and conclusions based on the survey are reliable. *Moore*, 151 F.3d at 276. O'Grady cannot meet this challenge.

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1. Survey Methodology and Results

Gelb conducted a survey in four markets – Houston, Los Angeles, Milwaukee, and Baltimore – to “explore the reactions of the relevant population to the Discovery Channel program, “BEL:SOS”. (Gelb Report at p. 4, § IV). The 203 participants were chosen after a telephone interview in which they were asked whether they had the Discovery Channel in their home in 2001, and if they had seen one or more Discovery Channel programs in the past 3 months preceding the telephone interview. (*Id.* at Exh. B). The sample selected resulted in a group of 46% male and 54% female. (*Id.* at p. 4, § B).

2. Survey Reliability under Rule 702.

The evidentiary value of a survey depends on its underlying objectivity as determined through many factors, such as “whether [the survey] is properly ‘filtered’ to screen out those who got no message from the advertisement, whether the questions are directed to the real issues, and whether the questions are leading or suggestive.” *Johnson & Johnson-Merck Consumer Pharm. Co. v. Smithkline Beecham Corp.*, 960 F.2nd 294, 300 (2nd Cir.1992).

The Gelb Survey is fatally flawed in several respects, including having an (1) unrepresentative survey universe, (2) failure to incorporate any form of control to measure error or bias, and (3) using leading and ambiguous question structures and sequences. (Declaration of Philip Johnson attached hereto (hereafter “Johnson Decl.”)).

a. Improper Universe

There is a relevance problem when a survey’s screening criteria does not produce a proper sample. Where the population sampled does not include any respondents from the proper

universe, the survey results will be irrelevant; where it is too broad (over-inclusive), the views of some respondents will be irrelevant; where the sample is too narrow (under-inclusive), the view of part of the universe will not have been measured, hence the survey results will be unreliable. *See R. Leighton*, “Using Daubert-Kumho Gatekeeping to Admit and Exclude Surveys in Lanham Act Advertising and Trademark Cases” 92 Trademark Reporter 743, 765-66 (2002).

Here the universe studied by Gelb bears little relationship to those who may have been exposed to the November 28th Broadcast. As Plaintiff admits, the target viewing audience for the November 28th Broadcast was a “demographic group of 18-49 males who are likely to be interested in war movies” (Resp. at 31). But Gelb did not consider the demographics of the Discovery Channel of November 28, 2001. (Gelb Dep. at 33:14-25)¹ Indeed, Gelb had no information about the type of people who saw the program on November 28, 2001. (Gelb Dep. at 34-35) In fact, the universe utilized in the Gelb Survey bears little relationship to those who may have actually seen the November 28th Broadcast. (Johnson Decl. at ¶ 20). While the audience who is attracted to a “military” style program is roughly two-thirds male, the Gelb Survey includes a preponderance of females (54%) in the survey universe. (Johnson Decl. at ¶ 9). Thus, the universe sampled does not represent the relevant population and, therefore, the survey results are irrelevant and unreliable.

b. No Control Group.

Gelb did not utilize a control group to take account of those respondents who would have been confused “regardless of the stimuli present.” (Gelb Dep. at 145:12-14); *See Mattell, Inc. v.*

¹ The Gelb deposition pages, Exhibits, and the Declaration of Phillip Johnson (“Johnson Decl.”) are attached hereto as App. I.

MCA Records, Inc., 28 F.Supp.2d 1120, 1135 (C.D. Cal. 1998), aff'd, 296 F.3d 894 (9th Cir. 2002). In fact, Gelb did not even consider using an outside control. (Gelb Dep. at 169:4-11)

The use of a control group is absolutely essential in adjusting survey results to account for so-called “noise in the market” unassociated with the subject matter of the survey. 5 McCarthy on Trademarks and Unfair Competition, § 32:187 (4th ed.1996); see also Jacob Jacoby, *Experimental Designs in Deceptive Advertising and Claim Substantiation Research*, 954 PLI/Corp 167, 176 (1991) (using a control group in surveys is “absolutely necessary”). It is a survey flaw not to use a control group. *See, e.g., Greenpoint Financial Corp. v. Sperry & Hutchinson Co., Inc.*, 116 F. Supp.2d 405, 409 (S.D.N.Y. 2000); *see also* Jacob Jacoby, Amy H. Handlin, & Alex Simonson, *Survey Evidence in Deceptive Advertising Cases Under the Lanham Act: An Historical Review of Comments from the Bench*, 954 PLI/Corp. 83, 89 (1994) (emphasizing that “there can be no trustworthy or valid assessment of cause and effect unless surveys are intertwined with proper experimental designs (which, of necessity, involve the utilization of proper controls)”); David H. Kaye & David A. Freeman, *Reference Guide on Statistics*, in *Reference Manual on Scientific Evidence*, at 348-49 (1994) (“[O]utcome figures from a treatment group without a control group reveal very little and can be misleading. Comparisons are essential.”).

Because Gelb did not use a control group in administering the survey, the responses “reveal very little” and are, in fact, misleading. Gelb did nothing to control the inevitable “noise in the market” that would affect survey responses, and the percentages of respondents who were purportedly confused in Gelb’s survey is of no moment -- in *Winning Ways, Inc. v. Holloway Sportswear, Inc.*, 913 F.Supp. 1454, 1475-76 (D. Kan. 1996), the district court discounted a survey entirely when it showed 48-58% confusion when the survey contained only “numbers that

had not been adjusted to account for noise in the market.” Thus, the survey and resulting data are unreliable and should be excluded. Other courts have similarly rejected survey results when a control group was not utilized. *See, e.g., Major League Baseball Properties, Inc. v. Sed Non Olet Denarius, Ltd.*, 817 F.Supp. 1103, 1123 (S.D.N.Y. 1993); *ConAgra, Inc. v. Geo. A. Hormel & Co.*, 784 F.Supp. 700, 728 (D. Neb. 1992), aff’d, 990 F.2d 368 (8th Cir.1993).

c. **Inherent Bias.**

The use of leading, suggestive, and ambiguous questions in the Gelb Survey further exacerbates the need for a control to measure the impact of the biases in the responses of the survey respondents. (Johnson Decl. at ¶ 11). A survey is “not credible if it relies on leading questions which are ‘inherently suggestive and invite guessing by those who did not get any clear message at all.’” *Johnson & Johnson-Merck Consumer Pharm. Co. v. Rhone-Poulenc Rorer Pharms., Inc.*, 19 F.3d 125, 134 (3rd Cir. 1994). A survey question that suggests its own answer, or presents a connection or association instead of allowing the respondents to form their own, is inherently biased and leading. *See Mattell, Inc. v. MCA Records, Inc.*, 28 F.Supp.2d 1120, 1135 (C.D. Cal. 1998), aff’d, 296 F.3d 894 (9th Cir. 2002); *Universal City Studios, Inc. v. Nintendo Co.*, 746 F.2d 112, 118 (2nd Cir. 1984).

For example, in *Universal City Studios, Inc.*, the plaintiff submitted a survey that asked whether “the Donkey Kong game [was] made with the approval or under the authority of the people who produce the King Kong movies?” *Universal City Studios, Inc.*, 746 F.2d at 118. The Second Circuit criticized the question because it was “an obvious leading question.” *Id.* The participants were presented with the Donkey Kong-King Kong connection rather than permitted to make their own associations. *Id.* “A survey question which begs its answer cannot be a true

indicator of the likelihood of consumer confusion.” *Id.* The district court in *Mattel, Inc.*, affirmed on appeal, reached the same conclusion with respect to a question that asked: “Do you think the company which owns the Barbie doll brand gave its permission to use the Barbie name on the music CD package?” *Mattel, Inc.*, 28 F.Supp.2d at 1134-35.

Here, the Gelb Survey questions are leading and suggestive in construction, while ambiguous in context. In fact, Gelb even changed a critical question when he obtained an unfavorable response to a pretest survey. Gelb’s initial March 6th pretest question 7 read: “After seeing this program, do you think The Movie that was advertised is or is not the actual pilot’s real life story.” (See Exh. 336) But after looking at the results of the pretest, Gelb “decided that one question was not clear.” (Gelb Dep. at 96:7-25). That question was number 7. (*Id.* at 97:1-9) The pretest results indicated that a total of six (6) respondents agreed it was an actual pilot’s real life story and 13 did not think it was the actual pilot’s real life story. (Gelb Dep. at 114:17; 115:9; 116:1-6, Exh. 338). Gelb conferred with Plaintiff’s counsel about the test results. (Gelb Dep. at 113:25-114:16). Afterwards, there was a revision to question 7. (Gelb Dep. at 117:19-23).

Question 7 was changed to read: “After seeing this program, do you think that the movie that was advertised is or is not a *Hollywood version of the actual pilot’s real life story*.” (Gelb Dep. at 118:7-18; Exh. 340). When asked why he changed the question, Gelb testified as follows:

Q: You wanted to get across that it ... was a Hollywood movie version of the pilot’s story?

A: Exactly.

(Gelb Dep. at 99:3-7).

Gelb continued later:

Q: And your intention was that they should think that ... the documentary and the Fox movie were telling the same story?

A: No.

Mr. Flynn: Object form.

A: No ... I just want them to understand that this was a Hollywood version so they would get a little more feel. But when you do a Hollywood version of a movie, you don't tell somebody's exact life story. You embellish it.

Q: **So you wanted them to understand that it was a Hollywood version of the Scott O'Grady story?**

A: Yes.

(Gelb Dep. at 110:2-14).

Thus, Question 7 was revised to include "Hollywood version" because Gelb intended to illicit the response that the movie was "a Hollywood version fo the Scott O'Grady's story." This is a textbook example of an obviously leading question which begs its answer. As such it cannot possibly be a true indicator of the likelihood of consumer confusion and the survey should not be admitted because it is not credible or reliable. *See Mattel*, 28 F.Supp. 22 at 1135 and *Universal City Studios, Inc.*, 746 F.22 at 118.

Defendants' expert Philip Johnson also offered the following criticisms of the Gelb Survey:

16. In Question 3, Gelb asks respondents, "*So far as you recall, did the actual pilot who was shot down in enemy territory appear in any part of this one-hour program?*" This is a leading question that is full of information that the respondent may or may not have recalled on their own, without being aided by the question. It does, at the minimum, suggest that there was "*an actual pilot*," who was "*shot down in enemy territory*," who did

appear in *“part of this one-hour program.”* Instead of using this type of leading question structure that prompts respondents, the accepted methodological practice is to ask an open-ended question that allows the respondent to answer in their own words, or ask a series of questions such as, *“What was the program you saw about? PROBE: What else do you recall in this program?”*

18. Inexplicably, the Gelb survey proceeds to ask Question 7 of all respondents, even of those who did not recall that the Fox movie *“Behind Enemy Lines”* was advertised: *“After seeing this program, do you think that the movie that was advertised is a Hollywood version of the actual pilot’s real-life story, or is not a Hollywood version of the actual pilot’s real-life story?”* This central question in the Gelb study is so poorly designed and constructed, and the alternatives are so unclear and ambiguous, that no conclusions can be drawn from the results. For instance, the “choices” forced on the respondent assume the respondent has a belief about the *“actual pilot’s real-life story”* when it is uncertain whether respondents had thought about it before being asked the question. It is also impossible to decipher what the alternative choices mean given the introduction of the term *“Hollywood version.”*

19. The term *“Hollywood”* as an adjective is generally used to describe events that are made-up or fictional. At the least, the choice of the verbiage, *“Hollywood version of the actual pilot’s real-life story”* appears to be a textbook example of an oxymoron. In such a situation, without any control cell to determine how a respondent would answer such a question, no conclusions can be drawn from the results of this question. Even the follow-up in Question 8, *“Why do you say that [this movie is a Hollywood version of the actual pilot’s real-life story]?”* demonstrates this ambiguity. For example, the most frequent response listed in the table provided in the Gelb report suggests that one out of four (25%) of those respondents who agreed that it was a *“Hollywood version,”* said that this was because *“events in the movie were similar to a real story but more far-fetched.”* This response suggests that the survey participant recognizes that it is not Scott O’Grady’s story, but it is a similar story, a position that is consistent with the defendant’s claim in this dispute.

20. The creation of this confusing and ambiguous question apparently occurred as a “remedy” when a somewhat more appropriate question was tested in a preliminary survey (or pre-test), which asked. *“After seeing this program, do you think that the movie which was advertised is or is not the actual pilot’s real life story?”* While sharing many of the leading characteristics and

tendency to inform the respondent as the later version, this question notably does not contain the words "Hollywood version." Without this confusing use of "Hollywood version" in the key survey question, just 32% of the "pre-test" respondents replied "yes." This result contrasts sharply with the results obtained by the "altered" version of this question where 70% answered "yes." In effect, these differences suggest that respondents understand quite clearly that the movie is not the "O'Grady story" but rather is simply a Hollywood movie that is only loosely related to or "inspired by" this story. In his deposition testimony, Mr. Gelb reports that he made this change to the key survey question because it was not working the way he would have liked.

21. The Gelb study then continues to pursue this suggestive line of questioning, irrespective of whether the respondent had any views, by asking Question 9, *"After seeing the program, do you think the actual pilot endorses or doesn't endorse the movie advertised on the program you just saw?"* This is another poorly constructed question that suggests that the "actual pilot" should have a position or stance about the movie; i.e., endorse/does not endorse the movie advertised. This comes right after the previous suggestive questioning sequences that informed survey respondents that the movie may be a *"Hollywood version"* of the *"actual pilot's real-life story."*

22. At this juncture, the question series may have confused respondents into thinking that the survey questions referred to the Discovery Channel program (which had been described to them as an action-adventure video when they were recruited), rather than to the Fox movie. For example, 22% of those who agreed with the idea that the pilot endorses the film say it is because *"he was talking on the program,"* or 3% of respondents said *"(It) showed true life of O'Grady with movie clips,"* and 2% of respondents said *"He'd like people to see what happened, not the Hollywood version."* These responses suggest that when they answered this survey question, respondents may have been referring to the Discovery Channel program, or scenes contained within the Discovery Channel program, and not the Fox movie. In addition, the structure of Question 9 is highly speculative and encourages guessing. This kind of question may result in respondents conducting a "mental coin toss," where about half (49%) of the respondents agree that the pilot endorses the movie, and the other half (51%) report either that the pilot does not endorse the movie (26%), or that they do not know (25%).

21.[sic] By the end of the Gelb study, respondents have been exposed to a constant barrage of the following terms: *"the*

program,” “the actual pilot,” “the pilot’s real-life story,” “the movie,” “the movie advertisement,” and “a Hollywood version.” In addition, the questions in the Gelb study repeat the phrase “advertised on the program,” suggesting that the advertisements are contained in the Discovery Channel program itself, rather than occurring in the “commercial space” which interrupts the program. The cumulative impact of this confusion on the survey respondents is unknown. Again, without a measure of how respondents would answer such speculative questions when exposed to a control stimulus, no conclusions can be drawn from these responses other than the fact that they appear to reflect guessing behavior.

(See Johnson Decl.)

In his deposition, Gelb agreed there was confusion and ambiguity in the survey. For example, in drafting the Survey, Gelb used the word “endorse” in Question 9. “Endorse,” according to Webster’s Seventh Collegiate Dictionary, is defined as,” to express a definite approval of.” (Gelb Dep. at 89:14-18). Gelb’s own definition of “endorse” means “to express support or approval.” (Gelb Dep. at 86:19-21). Gelb, however, did not provide the participants with a definition of endorse but instead asked them what they meant by “endorse.” (Gelb Dep. at 90:3-10, 92:10-93:2).

The participants responses to why they thought the pilot endorsed the movie (Question 10) included answers such as “Because I don’t think the movie portrayed him in a bad light. The movie portrayed him as a hero for surviving behind enemy lines” (Ex. 335-Gelb 836). When Gelb was asked whether this particular answer comported with the dictionary definition of the word, Gelb responded “I was not interested necessarily in a dictionary definition of endorse but in whether or not the people gave the answer as to why the actual pilot endorses the movie, that it had some representation of their personal truth.” (Gelb Dep. at 127:13-25).

The same respondent answered Question 11 (“When you say the pilot endorses the movie, what do you mean by endorses?”): “I think he agrees with the story line because it had

some kind of truth to it. It was similar to his truth.” (Exh. 335-Gelb 836) When asked what he thought about that response, Gelb answered “I think it’s a good definition of the word from this person’s point of view.” (Gelb Dep. at 128:15-23).

The confusion and ambiguity are clear from a sample of the responses set forth below to Question 10: “Why do you say the pilot endorses the movie?”

“I think if I was him and had this experience, I would want others to know what happens.”

(Gelb Dep. at 137:16-24, Exh. 341-Gelb 218).

“To show how rough it was for him and how wonderful it was that others came for him.”

(Gelb Dep. at 152:4-14, Exh. 341-Gelb 299).

“Because they are showing you what happened in the war, they are reenacting the real story so that we can see what actually happened since we can’t be there.”

(Gelb Dep. at 157:7-15, Exh. 342-Gelb 547).

“Because he knew that showing that show would help someone out and also show them how to handle the situation so why keep it a secret when you know.”

(Gelb Dep. at 160:23-161:14, Exh. 343-Gelb 1039).

“Because he didn’t say anything bad about the movie he was neutral.”

(Gelb Dep. at 163:9-17, Exh. 343-Gelb 1089).

Other examples are included in Exhs. 341 through 343 attached hereto for the Court’s review, if necessary.

In fact, Gelb admitted numerous times in his deposition that he did not know whether the participants, in answering the questions, were responding to the Discovery Channel documentary

or to the Fox Movie. (See Gelb Dep. at 138:25-139:12; 141:3-25; see Exh. 341-Gelb 233; Gelb Dep. at 152:4-14; Exh. 341-Gelb 299; Gelb Dep. at 156:6-158:2; see Exh. 342-Gelb 547, Gelb 607; Gelb Dep. at 157:7-158:2, Exh. 342-Gelb 547.

Moreover, regardless of the participants' explanations to Questions 10 and 11 as to why they said the pilot endorsed the movie or what they meant by endorse, the responses were included in the tabulation. (*See, e.g.*, Gelb Dep. at 156:6-157:6, Exh. 342 Gelb 607; Gelb Dep. at 160:23; Gelb Dep. at 137:16-138:6; Exh. 341 Gelb 218). In other words, so long as the participant answered Question 9 or 9A, that the actual pilot endorsed the movie, it didn't matter what they put down as their explanation. (See Gelb Dep. at 137:16-138:20).

Consequently, the survey responses offer little other than to illustrate that the confusion lay in the structure of the survey and its questions - not the November 28th Broadcast. Thus, the Gelb Survey does not withstand the scrutiny of Fed. L. Civ. P 702 and should be excluded.

2. **Exhibit 8** - Fox Film objects to certain excerpts from the deposition of Patrick Byers ("Byers") which are attached as Exhibit 8 to the Appendix on the grounds that the portions on which Plaintiff relies to oppose summary judgment are not responsive to the questions, not based on personal knowledge as required by FED. R. EVID. 602; rather, they are either based on improper hearsay under FED. R. EVID. 801, sheer speculation, and/or bias. The specific portions of the deposition excerpts from Byers's deposition to which Fox Film objects and moves to strike are:

- Fox Film objects to the testimony of Byers beginning on page 18, line 12 and continuing through page 19, line 16; page 36, lines 5-20; and page 37, beginning on line 16 and continuing through page 38, line 2 on the grounds that his impression of the DCI documentary that aired on November 28, 2001 is biased and incomplete. To place Byers' testimony in its proper context, Fox Film

invokes the rule of optional completeness. Fed. R. Evid. 106. Byers admits that he did not watch the entire broadcast of the DCI Documentary. See App. II; Byers Dep. 17:16-22.

- Fox Film objects to the testimony of Byers beginning on page 36, lines 5 and continuing through page 37, line 2 on the grounds that the witness's testimony is nonresponsive to the question asked by counsel and is not based on personal knowledge; rather, it is based on speculation, hearsay, or both and purports to give the opinion of an undisclosed opinion witness.
- Fox Film objects to the testimony of Byers on page 37, line 16 and continuing through page 38, line 2 on the grounds that the witness's testimony is nonresponsive to the question asked by counsel and is not based on personal knowledge; rather, it is based on speculation, hearsay, or both and purports to give the opinion of an undisclosed opinion witness.

3. **Exhibit 9** - Fox Film objects to certain excerpts from the deposition of John Davis ("Davis") which are attached as Exhibit 9 to the Appendix on the grounds that the cited portions on which Plaintiff relies to oppose summary judgment have been mischaracterized and do not support Plaintiff's stated proposition. Specifically, the deposition excerpts from Davis's deposition to which Fox Film objects beginning at page 27, line 20 and continuing through page 28, line 5 do not contain any testimony regarding the location where the Movie was shot or the release date for the Movie.

4. **Exhibit 10** - Fox Film objects to certain excerpts from the deposition of Bill Flanagan ("Flanagan") which are attached as Exhibit 10 to the Appendix on the grounds that the portions on which Plaintiff relies to oppose summary judgment are not based on personal knowledge as required by FED. R. EVID. 602; rather, they are either based on improper hearsay under FED. R. EVID. 801, sheer speculation, and/or bias. The specific portions of the deposition excerpts from Flanagan's deposition to which Fox Film objects are:

- Fox Film objects to the cited testimony of Flanagan on the grounds that his impression of the DCI Documentary that aired on November 28, 2001 is biased and incomplete. To place Flanagan's testimony in its proper context, Fox Film

invokes the rule of optional completeness. FED. R. EVID. 106. Flanagan admits that he “really wasn’t paying attention” to the DCI Documentary as it aired on November 28, 2001 and that he “didn’t really sit down and see all of it.” See App. III; Flanagan Dep. 28:4-11.

- Fox Film objects to the following cited deposition excerpts of Flanagan: beginning on page 45, line 6 and continuing through page 46, line 2; beginning on page 46, line 14 and continuing through page 47, line 2; and beginning on page 50, line 19 and continuing through page 51, line 7 on the grounds that they purport to give the opinion of an undisclosed opinion witness.

5. **Exhibit 12** - Fox Film objects to certain excerpts from the deposition of Thomas C. Grane (“Grane”) which are attached as Exhibit 12 to the Appendix on the grounds that the portions on which Plaintiff relies to oppose summary judgment do not support Plaintiff’s stated proposition. The specific deposition excerpts from Grane’s deposition to which Fox Film objects begins at page 12, line 21 and continuing through page 13, line 16 does not contain any testimony regarding “any disclaimers” from Fox Film for the Movie.

6. **Exhibit 13** - Fox Film objects to certain excerpts from the deposition of Michelle Marks (“Marks”) which are attached as Exhibit 13 to the Appendix on the grounds that the portions on which Plaintiff relies to oppose summary judgment are not based on personal knowledge as required by FED. R. EVID. 602; rather, they are either based on improper hearsay under FED. R. EVID. 801, sheer speculation and/or assumes facts not established by evidence. The specific portions of the deposition excerpts from Marks’s deposition to which Fox Film objects are:

- Fox Film objects to and moves to strike the question and answer from Plaintiff’s counsel at page 61, lines 5-9 on the grounds that the question calls for and elicits speculation and/or hearsay.
- Fox Film objects to and moves to strike Plaintiff’s repeated misrepresentation of Marks deposition testimony at page 49, lines 9-20. The line of questions was about “the same story as the Discovery Channel program” not whether the Movie had anything to do with Scott O’Grady himself.

7. **Exhibit 54** - Fox Film objects to Exhibit 54 to the Appendix on the grounds that the document contained therein, a Twentieth Century Fox Interoffice Memo dated January 28, 2000 regarding Behind Enemy Lines is irrelevant and immaterial to any issue in this case under FED. R. EVID. 402/403.

8. **Exhibit 58** - Fox Film objects to Exhibit 58 to the Appendix on the grounds that the document contained therein, a Recruited Audience Survey of Behind Enemy Lines conducted by the National Research Group, Inc. and bates labeled as FOX 03256 through 03274, constitutes impermissible hearsay under FED. R. EVID. 801 and is irrelevant and immaterial to any issue in this case under FED. R. EVID. 402/403.

9. **Exhibit 59** - Fox Film objects to Exhibit 59 to the Appendix on the grounds that the document contained therein, bates labeled as FOX 065851 through 065852, as irrelevant and immaterial to any issue in this case under FED. R. EVID. 402/403, constitutes improper hearsay under FED. R. EVID. 801, and assumes facts not in evidence.

10. **Exhibit 60** - Fox Film objects to Exhibit 60 to the Appendix on the grounds that the document contained therein, a Recruited Audience Survey of Behind Enemy Lines conducted by the National Research Group, Inc. and bates labeled as FOX 03234 through 03255, constitutes impermissible hearsay under FED. R. EVID. 801 and is irrelevant and immaterial to any issue in this case under FED. R. EVID. 402/403.

11. **Exhibit 63** - Fox Film objects to Exhibit 63 to the Appendix on the grounds that the documents contained therein, an Interoffice Memorandum dated November 30, 2001 from Peter Lozito to Allison Kramer and Flo Grace, with handwriting reflected thereon, and attaching news clippings, are irrelevant and immaterial to any issue in this case under FED. R. EVID.

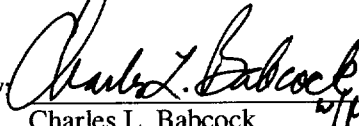
402/403, constitutes improper hearsay under FED. R. EVID. 801, and assumes facts not in evidence.

II. PRAYER

WHEREFORE, Defendant Twentieth Century Fox Film Corporation requests that the objections to summary judgment evidence contained herein be sustained, and that the Court strike said summary judgment evidence from the record for the reasons stated above, and that the Court not consider the above-referenced testimonial or documentary evidence in its determination of Defendants' Motions for Summary Judgment, and for such other and further relief at law or in equity to which it may justly be entitled, and for such other and further relief, at law or in equity, as the Court may deem appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was served upon the following counsel of record on this 11th day of August, 2003:

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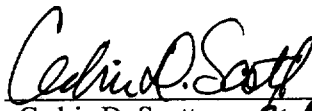
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Gabriel Gelb

June 19, 2003

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1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF TEXAS
3 TEXARKANA DIVISION
4 SCOTT O'GRADY,)
5 Plaintiff,)
6 VS.) CIVIL ACTION NO. 502CV173
7))
8 TWENTIETH CENTURY FOX)
9 FILM CORPORATION, and)
10 DISCOVERY COMMUNICATIONS,)
11 INC.,)
12 Defendants.)

ORAL AND VIDEOTAPED DEPOSITION

GABRIEL M. GELB

JUNE 19, 2003

ORAL AND VIDEOTAPED DEPOSITION of GABRIEL M. GELB, produced as a witness at the instance of the Defendant, Twentieth Century Fox Film Corporation, and duly sworn, was taken in the above-styled and numbered cause on the 19th day of June, 2003, from 9:15 a.m. to 4:53 p.m., before Rhonda K. Ashman, CSR, RPR, in and for the State of Texas, reported by stenographic means, at the offices of Locke, Liddell & Sapp, LLC, 2200 Ross Avenue, Suite 2200, Dallas, Texas, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

Gabriel Gelb

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<p style="text-align: right;">Page 230</p> <p>1 I, GABRIEL M. GELB, have read the foregoing 2 deposition and hereby affix my signature that same is 3 true and correct, except as noted above. 4 5 _____ 6 GABRIEL M. GELB 7 STATE OF _____ 8 COUNTY OF _____ 9 10 Before me, _____, on this 11 day personally appeared GABRIEL M. GELB, known to me 12 (or proved to me under oath or through 13 _____) to be the person whose name is 14 subscribed to the foregoing instrument and 15 acknowledged to me that they executed the same for the 16 purpose and consideration therein expressed. 17 Given under my hand and seal of office this 18 _____ day of _____, 2003. 19 20 _____ 21 NOTARY PUBLIC IN AND FOR 22 THE STATE OF _____ 23 24 25</p>	<p style="text-align: right;">Page 232</p> <p>1 the deposition, the Deponent _____, and/or the 2 Plaintiff/Defendant _____ did _____ did not _____ 3 request to review the transcript. 4 Certified to by me this _____ day of _____ 5 _____, 2003. 6 7 8 9 10 RHONDA K. ASHMAN, Texas CSR 5259 11 Expiration Date: 12-31-03 12 ESQUIRE DEPOSITION SERVICES 13 703 McKinney Avenue 14 Suite 320 15 Dallas, Texas 75202 16 (800) 852-9737 17 18 19 20 21 22 23 24 25</p>
<p style="text-align: right;">Page 231</p> <p>1 STATE OF TEXAS) 2 3 I, Rhonda K. Ashman, Certified Shorthand Reporter 4 in and for the State of Texas, do hereby certify that, 5 pursuant to the agreement hereinbefore set forth, 6 there came before me on the 19th day of June, A.D., 7 2003 at 9:15 a.m., at Locke, Liddell & Sapp, in the 8 City of Dallas, County of Dallas, and State of Texas, 9 the following named person to-wit: Gabriel M. Gelb, 10 who was by me duly sworn to testify the truth and 11 nothing but the truth of his knowledge touching and 12 concerning the matters in controversy in this cause; 13 and that he was thereupon carefully examined upon his 14 oath and his examination reduced to writing under my 15 supervision; that the deposition is a true record of 16 the testimony given by the witness, same to be sworn 17 to and subscribed by said witness before any Notary 18 Public, pursuant to the agreement of the parties. 19 I further certify that I am neither attorney or 20 counsel for, nor related to or employed by, any of the 21 parties to the action in which this deposition is 22 taken, and further that I am not a relative or 23 employee of any attorney or counsel by the parties 24 hereto, or financially interested in the action. 25 I further certify that before the completion of</p>	<p style="text-align: right;">Page 233</p> <p>1 COURT REPORTER DISCLOSURE STATEMENT 2 X Please be advised that pursuant to Rule IV.B4 of 3 the standards and rules for certification of Certified 4 Shorthand Reporters as promulgated by the Supreme 5 Court of Texas with regards to disclosure, I have no 6 existing or past financial, business, professional, 7 family or social relationships with any of the parties 8 or their attorneys which to some might reasonably 9 create an appearance of partiality. 10 Please be advised that Esquire Deposition 11 Services has entered into a volume-related discount 12 fee structure with a party in this lawsuit; and that 13 if such discount is in effect, all parties in this 14 case will receive the same discount for any like 15 product and/or service. 16 Please be advised that there is an existing or 17 past financial, business, professional, family or 18 social relationship with counsel involved in this 19 case, separate and apart from counsel simply doing 20 business with Esquire Deposition Services (or related 21 companies) in the past. 22 This relationship is: 23 _____ 24 Court Reporter: Rhonda K. Ashman, CSR, RPR 25 CSR Number: 5259 Date: June 19, 2003 Rhonda K. Ashman, CSR, RPR 18 CERTIFICATE OF SERVICE 19 This is to certify that a true and correct copy of the 20 foregoing disclosure statement has been presented to 21 all counsel present at the deposition, and a copy of 22 same will be attached to all transcript copies. 23 _____ 24 Rhonda K. Ashman, CSR, RPR 25</p>

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<p style="text-align: right;">Page 6</p> <p>1 GABRIEL M. GELB, 2 having been first duly sworn, testified as follows: 3 EXAMINATION 4 BY MS. HAMILTON: 5 Q. Would you state your name for the record, 6 please. 7 A. Gabriel Michael Gelb. 8 Q. Mr. Gelb, you've been retained as an expert 9 in this case? 10 A. Yes, I have. 11 Q. And that is on behalf of the Plaintiff, Scott 12 O'Grady? 13 A. Yes. 14 Q. Let me hand you first what's previously been 15 marked as Exhibit Number 325, which is the notice of 16 deposition. And ask you if you've had an opportunity 17 to review that prior to today? 18 A. Yes, I have. 19 Q. Okay. And did you bring any documents with 20 you today? 21 A. No. 22 Q. Okay. Did you have an understanding 23 already -- communications with counsel regarding 24 production of documents relating to your work in this 25 case?</p>	<p style="text-align: right;">Page 8</p> <p>1 Q. And what cases were those? 2 A. I don't -- I don't remember offhand. 3 Q. Okay. What about false endorsement, have you 4 ever been retained as an expert to testify on matters 5 of false endorsement? 6 A. No. 7 Q. What is your understanding of what the 8 relevant population was? I think that was the term 9 that you were using. What -- what is the relevant 10 population that you were studying? 11 A. In my mind, the relevant population were 12 people who had access to the Discovery Channel in the 13 time period that the disputed program was shown. 14 Q. And how did you arrive at that determination? 15 A. Just seemed logical to me. 16 Q. No other reason other than it just seemed 17 logical? 18 A. That's correct. 19 Q. And how did you determine who -- and what was 20 the time frame that you're talking about? 21 A. Well, the disputed program was shown on 22 November 28th, 2001. So we wanted people who had 23 access to the Discovery Channel during that time 24 period and also were still watching the Discovery 25 Channel recently.</p>
<p style="text-align: right;">Page 7</p> <p>1 A. Did I have an understanding? 2 Q. Did you have a discussion with counsel about 3 production of documents that you worked on or that 4 were part of your work in relation to this case? 5 A. Yes. 6 Q. And have you produced all those documents? 7 A. To the best of my knowledge. 8 Q. Okay. How many times have you testified 9 before in trial? 10 A. In trial, about 10 or 12. 11 Q. Okay. And tell me what your understanding is 12 of your duties in this lawsuit. 13 A. To conduct a survey to determine whether or 14 not certain allegations by Captain O'Grady were 15 supported by the relevant population or not. 16 Q. And what were those allegations that you were 17 determining were supported or not? 18 A. Whether or not, after seeing the Discovery 19 Channel program, the relevant population believed that 20 Captain O'Grady was endorsing the Twentieth Century 21 Fox film, Behind Enemy Lines, and whether or not they 22 thought that that film told his story. 23 Q. Have you ever been retained as an expert 24 regarding false advertising claims? 25 A. I think so, maybe once or twice before.</p>	<p style="text-align: right;">Page 9</p> <p>1 Q. And why was it relevant, if at all, that they 2 were still watching the Discovery Channel? 3 A. Just so that they would be familiar with the 4 channel and still had access to it. 5 Q. Was there anything else that you considered 6 other than you were looking for people who had access 7 to the Discovery Channel as part of the relevant 8 population for your study? 9 A. Well, there were certain qualifications that 10 we screened for among those people who had access to 11 the Discovery Channel. 12 Q. And how did -- well, first of all, what were 13 those qualifications? 14 A. Those qualifications were people who had not 15 taken part in a research survey in the past six months 16 and -- let's see, that -- who -- who were part of any 17 entertainment company or video store. 18 Q. Any other qualifications? 19 A. No. 20 Q. What was the import, if anything, about 21 having people who had not taken part in a survey in 22 the last six months or past six months? 23 A. Well, you generally don't want people who are 24 professional surveyors, people who have been taking a 25 lot of surveys. You try to get a little bit more of a</p>

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<p style="text-align: right;">Page 30</p> <p>1 the movie itself.</p> <p>2 Q. And do you have an understanding of where</p> <p>3 this tape came from?</p> <p>4 A. Mr. Flynn.</p> <p>5 Q. Okay. Do you know whether it was produced by</p> <p>6 any of the parties or how did it -- you know, if you</p> <p>7 say strike one on the first tape that you got that was</p> <p>8 truncated, strike two on the second tape, the DCI tape</p> <p>9 because it didn't have the movie commercials, and then</p> <p>10 you go back, number three works, that -- that meets</p> <p>11 your criteria. Do you know how -- what the origin was</p> <p>12 of that tape?</p> <p>13 A. I know the origin of part of it.</p> <p>14 Q. Okay. And this is part of the tape which has</p> <p>15 been marked Exhibit 328?</p> <p>16 A. Is that the last tape?</p> <p>17 Q. Yes.</p> <p>18 A. It was my understanding that the last tape</p> <p>19 included the material that was in the original tape</p> <p>20 given to me.</p> <p>21 Q. It included the material in the original</p> <p>22 tape, but did it also include other material?</p> <p>23 A. No. You asked me what was in that tape. I</p> <p>24 said that what I know is that part of the tape was the</p> <p>25 same as I originally saw in the first tape and --</p>	<p style="text-align: right;">Page 32</p> <p>1 A. Yes.</p> <p>2 Q. Okay. You said it was important that the</p> <p>3 tape be complete. What do you mean by "complete"?</p> <p>4 A. I mean that the second tape apparently, as I</p> <p>5 said before, did not have commercials in it for other</p> <p>6 than the movie, so we did not have the localized</p> <p>7 retail and other commercials inserted in that.</p> <p>8 Q. Okay. And -- and why was it important to</p> <p>9 have those other commercials included in the tape?</p> <p>10 A. Because I wanted to show the respondents the</p> <p>11 tape as close to the actual program as we can get.</p> <p>12 Q. Okay. Did you make any efforts to locate</p> <p>13 other copies of this -- of the tape of the program as</p> <p>14 aired on December 28th -- I'm sorry, November 28th --</p> <p>15 A. No.</p> <p>16 Q. -- 2001?</p> <p>17 A. No.</p> <p>18 Q. So you made no independent effort to obtain</p> <p>19 the tape from Dec- -- November 28th, 2001?</p> <p>20 A. No.</p> <p>21 Q. Okay. But it was important to you that you</p> <p>22 show the participants the tape as aired on</p> <p>23 November 28th, 2001; is that correct?</p> <p>24 A. Yes.</p> <p>25 Q. And why was it important?</p>
<p style="text-align: right;">Page 31</p> <p>1 which I understand was made by one of Captain</p> <p>2 O'Grady's friends.</p> <p>3 Q. Okay. Do you know the source of Exhibit 328?</p> <p>4 A. Is that the third tape?</p> <p>5 Q. Yes, that's the third tape.</p> <p>6 A. I don't know where the beginning portion came</p> <p>7 from, except that it was given to me by Mr. Flynn.</p> <p>8 Q. Okay. And in fact, it's -- the tape is</p> <p>9 labeled a combined -- November 28th combined Discovery</p> <p>10 Channel?</p> <p>11 A. Yes, it is.</p> <p>12 Q. Okay. So is it a combination of tapes?</p> <p>13 A. I believe so.</p> <p>14 Q. Okay. And were you told that by Counsel?</p> <p>15 A. Yes.</p> <p>16 Q. Okay. And what were you told?</p> <p>17 A. That it was the original tape that I saw,</p> <p>18 plus they had gotten the front part of the program</p> <p>19 added to that tape.</p> <p>20 Q. And do you know who added that to the tape?</p> <p>21 A. No.</p> <p>22 Q. And do you know where it came from?</p> <p>23 A. No.</p> <p>24 Q. Okay. But you were satisfied to take the</p> <p>25 tape that they had provided you?</p>	<p style="text-align: right;">Page 33</p> <p>1 A. To me it was -- obviously, if you're testing</p> <p>2 what the relevant population might take away from a</p> <p>3 program, you'd want them to see the program that was</p> <p>4 shown.</p> <p>5 Q. Okay. When you say the relevant population</p> <p>6 was taking away -- what they were taking away from the</p> <p>7 program?</p> <p>8 A. That's right.</p> <p>9 Q. And again, in your mind, the relevant</p> <p>10 population were just people who had access to the</p> <p>11 Discovery Channel through cable television; is that</p> <p>12 correct?</p> <p>13 A. Yes.</p> <p>14 Q. Did you consider the population of viewers of</p> <p>15 the Discovery Channel on November 28th, 2001?</p> <p>16 A. Would you repeat the question?</p> <p>17 Q. Did you consider the population that was</p> <p>18 watching the Discovery Channel on November 28th of</p> <p>19 2001?</p> <p>20 A. I thought about whether or not that would be</p> <p>21 possible to find those people, but then I gave that up</p> <p>22 as impractical.</p> <p>23 Q. Did you consider the demographics of the</p> <p>24 Discovery Channel of November 28th, 2001?</p> <p>25 A. No.</p>

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<p style="text-align: right;">Page 86</p> <p>1 response?</p> <p>2 THE WITNESS: No, I haven't finished my</p> <p>3 response.</p> <p>4 Q. (BY MS. HAMILTON) Okay.</p> <p>5 A. We -- I kind of had made a couple of</p> <p>6 adjectives as we have just described in the previous</p> <p>7 page and I didn't think we needed to get into any more</p> <p>8 descriptions of the program.</p> <p>9 Q. Okay. So you're saying that the one -- the</p> <p>10 change from the one-hour -- I'm sorry, from the</p> <p>11 documentary description in Exhibit 331 to a, quote,</p> <p>12 one-hour program in Exhibit 332 was your suggested</p> <p>13 change?</p> <p>14 A. Probably.</p> <p>15 Q. But you don't remember, really, one way or</p> <p>16 the other, do you?</p> <p>17 A. No.</p> <p>18 Q. The -- the change on the -- on the word</p> <p>19 "endorse," what is your definition of the word</p> <p>20 "endorse"?</p> <p>21 A. To express support or approval.</p> <p>22 Q. Okay.</p> <p>23 MS. HAMILTON: And using that</p> <p>24 definition, let me go ahead and mark this exhibit --</p> <p>25 actually, this can -- oh, why don't we make this</p>	<p style="text-align: right;">Page 88</p> <p>1 one exhibit. It's all going to be part of 333.</p> <p>2 Thanks.</p> <p>3 Q. (BY MS. HAMILTON) And if you would take a</p> <p>4 look, Mr. Gelb, at the brown, which is the Webster's</p> <p>5 Seventh New Collegiate Dictionary definition of</p> <p>6 endorse. I believe you have to go down to Number 2.</p> <p>7 Would you agree with me that your definition</p> <p>8 of endorse comports with that in the Webster's Seventh</p> <p>9 New Collegiate Dictionary?</p> <p>10 MR. FLYNN: Object to form.</p> <p>11 A. Where --</p> <p>12 Q. (BY MS. HAMILTON) Number two. It says, to</p> <p>13 express definite approval of.</p> <p>14 A. You were saying that my definition comports</p> <p>15 with this one?</p> <p>16 Q. Yes.</p> <p>17 A. It's a little different.</p> <p>18 Q. Okay. And what's the difference?</p> <p>19 A. Well, I use the word "support." They didn't.</p> <p>20 They use the word "definite." I didn't.</p> <p>21 Q. Do you disagree with the definition in the</p> <p>22 Webster's New Collegiate Dictionary of endorse as to,</p> <p>23 quote, to express definite approval of, closed quote?</p> <p>24 MR. FLYNN: Object to form.</p> <p>25 A. I think there are some senses where</p>
<p style="text-align: right;">Page 87</p> <p>1 combined.</p> <p>2 MR. FLYNN: Are we done with these?</p> <p>3 MS. HAMILTON: Yeah. I think she's got</p> <p>4 all three there. I show it's missing one.</p> <p>5 MR. FLYNN: Okay. Is this the one?</p> <p>6 MS. HAMILTON: Yeah.</p> <p>7 MS. HANDMAN: Thank you.</p> <p>8 MS. HAMILTON: And this is Exhibit 333?</p> <p>9 THE REPORTER: Yes.</p> <p>10 MR. FLYNN: Okay. Are these extra for</p> <p>11 me? Do y'all have --</p> <p>12 MS. HAMILTON: They may -- well, they go</p> <p>13 to the back. They're two different dictionary</p> <p>14 definitions. I'm just going to go ahead and mark them</p> <p>15 as one exhibit.</p> <p>16 (Exhibit Number 333 marked.)</p> <p>17 MS. HAMILTON: The first one is marked</p> <p>18 by the Webster's Seventh Collegiate Dictionary. It</p> <p>19 has brown on the cover sheet, its insignia.</p> <p>20 MR. FLYNN: Okay.</p> <p>21 MS. HAMILTON: And then behind that is a</p> <p>22 Yahoo Internet reference from the American Heritage</p> <p>23 Dictionary.</p> <p>24 MR. FLYNN: It's not marked yet.</p> <p>25 MS. HAMILTON: It should be all part of</p>	<p style="text-align: right;">Page 89</p> <p>1 endorsement could mean to somebody that if you didn't</p> <p>2 object to something you were endorsing it. So that's</p> <p>3 why I have a little bit of a problem with this</p> <p>4 specific definition. In other words, in the general</p> <p>5 population, if something goes on and you're aware of</p> <p>6 it but you don't object to it, that could connote</p> <p>7 endorsement.</p> <p>8 Q. (BY MS. HAMILTON) So are you saying that</p> <p>9 there's an ambiguity in the term "endorse"?</p> <p>10 MR. FLYNN: Object to form.</p> <p>11 A. Yes, I'm definitely saying that different</p> <p>12 people have different educational levels, would have</p> <p>13 different ways of describing that word.</p> <p>14 Q. (BY MS. HAMILTON) Okay. But you don't</p> <p>15 dispute the fact that Webster's Seventh Collegiate --</p> <p>16 New Collegiate Dictionary describes it as, quote, to</p> <p>17 express a definite approval of?</p> <p>18 A. No.</p> <p>19 Q. Okay. And then if you look at the document</p> <p>20 behind that, which is the Yahoo reference. I mean,</p> <p>21 that's a definition of endorse from the American</p> <p>22 Heritage Dictionary. And I'll grant you that the</p> <p>23 first three refer to endorsements of checks. But</p> <p>24 definition number four states, To give approval of or</p> <p>25 support to, especially by public statement, colon,</p>

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<p style="text-align: right;">Page 90</p> <p>1 sanction, colon, to endorse a political candidate. 2 A. That's what it says. 3 Q. Okay. In drafting the survey, did you give 4 any consideration to the def- -- dictionary definition 5 of endorse? 6 A. No. Just my own general description. 7 Q. Did you provide a definition for endorse, the 8 word endorse to the participants in the survey? 9 A. No. As you know, I let them provide their 10 definition. 11 Q. Okay. And so you let them define the term 12 according to what their standard of education, their 13 lifestyle, whatever they may understand the word 14 endorse to mean; is that correct? 15 A. That's correct. And it goes through two, 16 really, the basic thrust of my study, which is one -- 17 what do people understand or perceive as opposed to 18 what a dictionary definition might be. 19 Q. Did you consider -- but you specifically 20 chose the word "endorse," correct? 21 A. Yes. 22 Q. And so you -- you did not ask these 23 participants what did they perceive the picture to be 24 in -- 25 MR. FLYNN: Object --</p>	<p style="text-align: right;">Page 92</p> <p>1 is as described in the commercials of a documentary 2 program; is that -- is that what you're asking me? 3 I mean, I don't -- I don't -- I don't see the 4 relevance. I don't -- no, I did not ask them that, if 5 that's -- 6 Q. Okay. 7 A. -- the short version you're asking me. 8 Q. Thank you. 9 A. Okay. 10 Q. Did you consider any words other than endorse 11 with respect to -- I think it was question 7 of the 12 questionnaire? 13 A. No. 14 Q. Did you -- did -- who suggested the word 15 "endorse"? 16 A. I don't know. 17 Q. But just to be clear, you did not provide the 18 participants with a defined term for "endorse" in the 19 survey, did you? 20 A. I didn't want to insult my participants. 21 MS. HAMILTON: Objection, nonresponsive. 22 Q. (BY MS. HAMILTON) You did not provide them 23 with a defined term -- 24 A. No, I just -- 25 Q. -- for the word "endorse" in the survey?</p>
<p style="text-align: right;">Page 91</p> <p>1 Q. (BY MS. HAMILTON) -- so many words, did you? 2 MR. FLYNN: Object to form. 3 A. That question is not comprehensible to me. 4 Q. (BY MS. HAMILTON) Okay. Well, I'm just 5 trying to figure out what it is that -- that you asked 6 the participants specifically. You did not ask them, 7 for example, what they perceived the picture to be, 8 did you? 9 A. What picture? 10 Q. The -- the movie, the film, Behind Enemy 11 Lines? 12 A. The movie or the program? 13 Q. I'm asking about the movie. 14 A. Okay. You said picture. 15 Q. I'm sorry. Well, now -- now that we're 16 straight on the words. 17 A. Okay. 18 Q. The Fox movie, Behind Enemy Lines. 19 A. Would you repeat the question? 20 Q. Did you ask them what their perception was of 21 the movie, Behind Enemy Lines? 22 A. You're asking a question that -- 23 Q. You just -- you didn't ask that question -- 24 A. -- I'm finding hard to think about what 25 you're getting at. What their perception of a movie</p>	<p style="text-align: right;">Page 93</p> <p>1 A. I just asked them about endorse, and I asked 2 them what they meant by endorse. 3 MS. HAMILTON: Let's go ahead and mark 4 this as the next exhibit. Is it 334? 5 THE REPORTER: Uh-huh. 6 (Exhibit Number 334 marked.) 7 Q. (BY MS. HAMILTON) And have you had a chance 8 to look at 334? 9 A. I haven't looked at it until you ask me a 10 question. 11 Q. Okay. Well, would you take a look at it, 12 please? 13 A. Yes. 14 Q. I did ask a question. I may have gave you a 15 direction. 16 A. Okay. 17 Q. And Exhibit 334 is -- the original message in 18 the middle of the page, it's from you to C.W. -- 19 that's Peter Flynn at Locke, Liddell? 20 A. Yes. 21 Q. And attached to it was the -- it says 3/6 22 revised Q? 23 A. Right. 24 Q. And so were you transmitting the revised 25 questionnaire dated March 6th, 2002?</p>

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1 A. Yes.
 2 Q. Okay. And that was in accordance with the
 3 suggested changes that -- that you and Mr. Flynn and,
 4 perhaps, others had made to the questionnaire?
 5 A. Yes.
 6 Q. Okay. And did you discuss that revised
 7 questionnaire with Mr. Flynn at that time?
 8 A. I -- I can't recall really.
 9 Q. What was the next step that you recall in
 10 conducting this survey after March 6th?
 11 A. Well, if I'm not mistaken, this -- and let me
 12 look it over again.
 13 Q. Sure.
 14 A. But this appears to be the final version. I
 15 would have to compare this with the questionnaires,
 16 but except for some spacing issues, this -- the text
 17 seems to be the final version of what we used.
 18 Q. The text of Exhibit 334?
 19 A. Yes.
 20 Q. Okay. So then what was the next step?
 21 A. The next step was for Marilyn MacRill to
 22 organize this into making some formatting changes and
 23 for her to write the interviewer instructions.
 24 Q. Okay. And I take --
 25 A. And --

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1 Q. I'm sorry.
 2 A. And to test this in Houston, conduct a test.
 3 Q. Okay. And you went forward with exhi- --
 4 with the questionnaire 334 after the approval of
 5 Mr. Flynn?
 6 MR. FLYNN: Object to form.
 7 A. If approval, he might have said, looks fine
 8 to me. If you want to call that approval, fine. And
 9 as I said, it looks like what we started to implement
 10 in Houston.
 11 Q. (BY MS. HAMILTON) Okay.
 12 MS. HAMILTON: And let's go ahead -- I
 13 think we've got time. What's the next exhibit? I
 14 think 335.
 15 (Exhibit Number 335 marked.)
 16 Q. (BY MS. HAMILTON) And if you have a chance
 17 to look at that, please.
 18 (Soto voce discussion.)
 19 Q. (BY MS. HAMILTON) Oops. You know what, I
 20 gave you the wrong one. This is --
 21 A. Okay.
 22 Q. -- Exhibit 335. We'll leave it marked that
 23 way.
 24 A. Do you want these back?
 25 Q. No, you can keep it.

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1 A. Keep it out here.
 2 Q. Next one will be 336.
 3 (Soto voce discussion.)
 4 MS. HAMILTON: Just let me get through.
 5 Okay. Let's go ahead and mark that one
 6 as 336.
 7 (Exhibit Number 336 marked.)
 8 Q. (BY MS. HAMILTON) There you go. Now, I
 9 think I got it in order.
 10 And if you would identify those documents,
 11 please.
 12 A. These look like the initial interviews done
 13 in Houston.
 14 Q. Okay. When you say "the initial interviews,"
 15 what do you mean "the initial interviews"?
 16 A. Well, we did about 20 or so and then we took
 17 a look at the results and whether or not we needed to
 18 make any changes in terms of clarifying questions,
 19 which is what we usually do.
 20 Q. Okay. So is this a pretest?
 21 A. Yes.
 22 Q. Okay. And what did you decide after running
 23 this pretest?
 24 A. I decided that one of the questions was not
 25 clear.

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1 Q. And what question was that?
 2 A. Question 7.
 3 Q. Okay. And question 7, as it appears in the
 4 Houston pretest survey, which is Exhibit 336, reads:
 5 After seeing this program, do you think that the movie
 6 that was advertised is or is not the actual pilot's
 7 real life story. Is that the question you're talking
 8 about?
 9 A. Yes, it is.
 10 Q. And what was not clear about that question?
 11 A. Well, when people answered the question, a
 12 lot of them said that it was not the actual pilot's
 13 real life story because of some very narrowly read
 14 interpretations of the question.
 15 And specifically, for example, they said,
 16 some of them, that it was not the pilot's real life
 17 story because that was not the actual pilot shown in
 18 the movie or that there were some scenes in the movie
 19 that were not in the documentary program, so they said
 20 it was not his real life story.
 21 So there were some people who were taking --
 22 moving from the documentary to the movie extremely
 23 literally, and I decided that it would be wise to
 24 change that question.
 25 Q. Because you didn't want a literal response?

25 (Pages 94 to 97)

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<p style="text-align: right;">Page 98</p> <p>1 A. Well, I wanted a response that would -- that</p> <p>2 was realistic and some people didn't understand that</p> <p>3 when Hollywood does a movie, they don't do the actual</p> <p>4 fact for fact for fact from -- from real life.</p> <p>5 Q. But you -- you did not show these</p> <p>6 participants the Fox movie, Behind Enemy Lines, did</p> <p>7 you?</p> <p>8 A. No.</p> <p>9 Q. And so when you say -- I'm sorry. What --</p> <p>10 what was the confusion?</p> <p>11 A. The confusion was that some people didn't see</p> <p>12 the exact translation of the documentary to the scenes</p> <p>13 shown within the documentary of the movie. And so, as</p> <p>14 I said, they didn't see the same pilot in there. They</p> <p>15 saw some scenes that were added in the movie shown</p> <p>16 within the program that were not part of the</p> <p>17 documentary program. And they said, well, it's not</p> <p>18 the same so the movie is not the actual pilot's real</p> <p>19 life story.</p> <p>20 Q. Well, that would be an accurate response,</p> <p>21 wouldn't it?</p> <p>22 MR. FLYNN: Object to form.</p> <p>23 A. I felt that was a very literal and narrow</p> <p>24 response, that the question needed to be made clear</p> <p>25 that it was a Hollywood-type movie, doing the act --</p>	<p style="text-align: right;">Page 100</p> <p>1 are reflected in 336?</p> <p>2 A. Yes.</p> <p>3 Q. Okay. And do you know whether the</p> <p>4 respondents, or the participants, excuse me, to the</p> <p>5 pretest, the Houston pretest, which was done off of</p> <p>6 the March 6th questionnaire, were they obtained by the</p> <p>7 random digit dialing or were they obtained from the</p> <p>8 database?</p> <p>9 A. I would assume it would be the same people as</p> <p>10 we -- as -- that were in the whole sample. In other</p> <p>11 words, both. We didn't call -- we didn't have any</p> <p>12 separate criteria for any group of people in any of</p> <p>13 these tests.</p> <p>14 Q. Okay. So you don't know whether it was a</p> <p>15 mixture of the people or the Cre- -- Creative Consumer</p> <p>16 Research contacted or whether it was specifically the</p> <p>17 random dialing group?</p> <p>18 A. Well, the random dialing group were</p> <p>19 interspersed in that entire sample, so there wasn't</p> <p>20 any separation of that.</p> <p>21 Q. Okay.</p> <p>22 MS. HAMILTON: Let's mark this next --</p> <p>23 next exhibit. It'd be 337.</p> <p>24 (Exhibit Number 337 marked.)</p> <p>25 Q. (BY MS. HAMILTON) And I'd ask you to</p>
<p style="text-align: right;">Page 99</p> <p>1 doing -- asking them whether or not they thought that</p> <p>2 was the actual pilot's real life story.</p> <p>3 Q. (BY MS. HAMILTON) So you wanted to ask them</p> <p>4 whether or not -- you wanted to get across that it the</p> <p>5 Ho- -- it was a Hollywood movie version of the pilot's</p> <p>6 story?</p> <p>7 A. Exactly.</p> <p>8 Q. If you give me one second, I can see if I can</p> <p>9 line this stuff up.</p> <p>10 And who conducted the survey -- the pretest</p> <p>11 survey in Houston?</p> <p>12 A. Creative Consumer Research.</p> <p>13 Q. All right. So it was the same group that</p> <p>14 conducted the later Houston survey?</p> <p>15 A. Right.</p> <p>16 Q. Were there any other pretest surveys done</p> <p>17 other than -- than this one in Houston that is</p> <p>18 reflected in Exhibit 336?</p> <p>19 A. No.</p> <p>20 Q. And did you discern that the responses to</p> <p>21 question 7 were too literal from your personal review</p> <p>22 of the questionnaires that are in Exhibit 336?</p> <p>23 A. Yes.</p> <p>24 Q. Okay. And did you tabulate the responses to</p> <p>25 the various questions in the survey questionnaire that</p>	<p style="text-align: right;">Page 101</p> <p>1 identify that document.</p> <p>2 Could you identify that document for the</p> <p>3 record, please.</p> <p>4 A. It looks like the same March 6th</p> <p>5 questionnaire we've been talking about and that was</p> <p>6 used in the Houston pretest.</p> <p>7 Q. Okay. Do you know whose handwriting it is at</p> <p>8 the top where it says, Pretest Q, 3/18/03?</p> <p>9 A. It looks like Marilyn MacRill's.</p> <p>10 Q. Okay. And so do you know why she marked this</p> <p>11 document this way?</p> <p>12 A. This was the first -- first day's work.</p> <p>13 Q. Okay. So was the pretest done on March 18th,</p> <p>14 '03?</p> <p>15 A. Yes.</p> <p>16 Q. Okay. And if you look at the last page of</p> <p>17 Exhibit 337. Could you please identify that for me?</p> <p>18 A. That's one of the questionnaires from the --</p> <p>19 from the pretest.</p> <p>20 Q. I'm sorry, what?</p> <p>21 A. This -- this is a blank questionnaire.</p> <p>22 Q. Right.</p> <p>23 A. Right.</p> <p>24 Q. So if you'd take a look at the last page of</p> <p>25 Exhibit 337.</p>

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<p style="text-align: right;">Page 102</p> <p>1 A. The one that's not marked with a --</p> <p>2 Q. Yes.</p> <p>3 A. -- number?</p> <p>4 Q. Yes. And that's -- that's the way it was</p> <p>5 produced to us.</p> <p>6 A. Right.</p> <p>7 Q. Could you tell me what that document is?</p> <p>8 A. It says, Version 2, reword question 7.</p> <p>9 Q. Okay. So it -- it looks like --</p> <p>10 A. I told --</p> <p>11 Q. -- that's a Post-it?</p> <p>12 A. Yes. I told her we were going to reword</p> <p>13 question 7.</p> <p>14 Q. Okay. So out of all the questions following</p> <p>15 the March 18th pretest that are in the questionnaire,</p> <p>16 the -- the one that was going to be reworded is</p> <p>17 question 7?</p> <p>18 A. Yes.</p> <p>19 Q. Okay. And is that her handwriting; do you</p> <p>20 know?</p> <p>21 A. It's not mine, so I assume it's hers.</p> <p>22 Q. Okay. And did you discuss rewording that</p> <p>23 question with her?</p> <p>24 A. Yes.</p> <p>25 Q. And what did you discuss?</p>	<p style="text-align: right;">Page 104</p> <p>1 Q. All right. What other cities were the</p> <p>2 pretests done in?</p> <p>3 A. Oh, no. I'm sorry. I thought you said were</p> <p>4 they all done in one sitting.</p> <p>5 Q. City. Sorry.</p> <p>6 A. They were all done in one city.</p> <p>7 Q. Urban.</p> <p>8 A. Right.</p> <p>9 Q. Right.</p> <p>10 A. Houston.</p> <p>11 Q. Okay.</p> <p>12 A. Yes.</p> <p>13 Q. And were they all conducted by the same</p> <p>14 people?</p> <p>15 A. Yes.</p> <p>16 Q. Okay. And so there were no pretests done in</p> <p>17 any other cities in the United States?</p> <p>18 A. That's correct.</p> <p>19 Q. Okay. And the pretest that was done in</p> <p>20 Houston was done off of the March 6th, 2000 and -- it</p> <p>21 should be 3, it says 2 -- draft?</p> <p>22 A. Right.</p> <p>23 Q. Okay. And did you have discussions with</p> <p>24 counsel for Mr. O'Grady about your findings as a</p> <p>25 result of the Houston pretest?</p>
<p style="text-align: right;">Page 103</p> <p>1 A. I discussed -- when I looked over all of the</p> <p>2 pretest questionnaires and saw the problem that we had</p> <p>3 with the wording, as it was, and that there were</p> <p>4 people who really didn't appreciate or understand that</p> <p>5 a Holly- -- Hollywood movie is not a documentary, I</p> <p>6 discussed my thought as to how we would change the</p> <p>7 wording.</p> <p>8 Q. And had you discussed the results of the</p> <p>9 March 18th pretest with counsel for Mr. O'Grady?</p> <p>10 A. Yes.</p> <p>11 Q. And who did you discuss it with?</p> <p>12 A. Well, there is a part of your question that</p> <p>13 needs possibly to be modified. It may not have only</p> <p>14 been the March 18th -- it started March 18th, the</p> <p>15 pretest. That probably took a couple of days to -- to</p> <p>16 do --</p> <p>17 Q. Okay.</p> <p>18 A. -- the pretest.</p> <p>19 Q. Can we refer to it as the March 18th pretest?</p> <p>20 A. I'm happy to do so.</p> <p>21 Q. Okay. Because it was only -- was there only</p> <p>22 one pretest that was done with the questionnaires?</p> <p>23 A. Well, there was several groups.</p> <p>24 Q. But were they all done in one city?</p> <p>25 A. No.</p>	<p style="text-align: right;">Page 105</p> <p>1 A. Yes.</p> <p>2 Q. And what discussions did you have with</p> <p>3 Counsel?</p> <p>4 A. I told him what I thought the problem with</p> <p>5 the question was. I read him some of the responses</p> <p>6 that indicated that they were giving a very narrowly</p> <p>7 focussed answer, and I suggested the solution.</p> <p>8 Q. And what was the solution that you suggested?</p> <p>9 A. Adding the word Hollywood version of the --</p> <p>10 well, adding the words "a Hollywood version."</p> <p>11 Q. Did you discuss the responses to any of the</p> <p>12 other questions with counsel for Mr. O'Grady other</p> <p>13 than the question -- responses to question 7?</p> <p>14 A. I told him in general what -- what the other</p> <p>15 responses were, because we did have a tabulation of</p> <p>16 those.</p> <p>17 Q. Okay. Would you take a look at 3 --</p> <p>18 Exhibit 336 and tell me, you know, specifically if you</p> <p>19 find a response to 7 that you think typifies what your</p> <p>20 concern was?</p> <p>21 A. Well, I could do it from the -- I could do it</p> <p>22 from the questionnaire, yes. Are we talking 336?</p> <p>23 Q. Yes.</p> <p>24 A. Okay. Great.</p> <p>25 Well, the first one that I turn to --</p>

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1 Q. What -- would you give me the Bates label at
2 the bottom of the page so I can follow along?
3 A. 718.
4 Q. Okay.
5 A. The person said in question 7 --
6 Q. And this question 7 on page Gelb marked --
7 A. 720.
8 Q. 720. Okay.
9 A. Right. He said, It is not the actual pilot's
10 real story. And then when we say, Why do you say
11 that? He or she said, It's historical fiction. There
12 are differences such as the action has two
13 characters --
14 Q. Is that fiction or action? I guess it could
15 be either.
16 A. It could be either. -- has two characters
17 that were shot down and the real event had only
18 O'Grady.
19 So that's why I say that in this particular
20 one, it was a very narrow interpretation. He could
21 not accept that the Hollywood movie was different from
22 the documentary.
23 Turning to 723, again, the person said in
24 question 7, It is not --
25 Q. And that's -- I'm sorry, that's at page

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1 program, he was just working around -- walking around
2 by himself and they found him. Parts of the movie
3 like when the wife and father get a phone call about
4 him, no one was actually telling --
5 Q. How about actually there filming?
6 A. Oh, was actually there filming, so I thought
7 it was a reenacted moment.
8 Q. Okay. Do you -- how can you tell at this
9 point -- and this is on Gelb -- marked Gelb 730, which
10 is part of Exhibit 336. Can -- can you -- looking at
11 this page and this question, can you tell whether
12 they're talking about the Fox movie, or are they
13 talking about the reenactment being the Discovery
14 Channel documentary?
15 A. Well, the answer to your question is that
16 that delineated separately in the question itself,
17 which is, after seeing this program, do you think the
18 movie that was advertised is not the actual pilot's
19 real life story or is the pilot's real life story.
20 That person said it is not the pilot's story
21 because there were additional things in the movie that
22 he didn't see in the documentary.
23 Q. Okay. But then in the response, as you read,
24 parts in the movie like when the wife and father got a
25 phone call about him, do you know whether that scene

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1 Gelb 725?
2 A. Yes. Thank you for clarifying that.
3 Let me read it and see if that's one of the
4 ones that I think has that narrow interpretation.
5 Q. Okay. And you didn't want them to have a
6 narrow interpretation; is that correct?
7 MR. FLYNN: Object to form.
8 A. I didn't -- if the person thought that the
9 movie had to be exactly the same as the documentary,
10 then I thought we had missed out on the purpose of
11 that question.
12 Q. (BY MS. HAMILTON) Okay.
13 A. Such as in this person on 725 says he didn't
14 think it was the actual movie because some of the
15 events in the movie I don't think go along with what I
16 saw actually happen to him in the program.
17 Now, that's exactly what I'm talking about
18 here.
19 Q. Okay.
20 A. I turn to 728. Again, the same -- what I
21 think is the same problem. The person said, It is not
22 the actual pilot's real life story. And he or she
23 says as a reason, The movie had a lot more than what
24 we saw in the program. In the movie, there were other
25 people involved and more drama in the movie. In the

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1 occurs in the movie, Behind Enemy Lines, the Fox film?
2 A. I didn't see the movie.
3 Q. So you don't know whether that respondent is
4 responding to the movie or the Discovery Channel
5 documentary at that point --
6 A. Right.
7 Q. -- of their answer; is that correct?
8 A. Right.
9 Q. Okay.
10 A. On Bates --
11 MR. FLYNN: Are we still going on this
12 question?
13 MS. HAMILTON: No.
14 Q. (BY MS. HAMILTON) Well, if you --
15 MR. FLYNN: Why don't we --
16 MS. HAMILTON: No. We're -- we're --
17 we're fine.
18 Q. (BY MS. HAMILTON) Unless there's something
19 more that you specifically want to point out, you're
20 welcome to.
21 A. No, I've pointed out several areas where
22 people took a very literal view. Maybe they were
23 attorneys. I don't know. Or engineers. Unless they
24 saw the same thing repeated in the advertisements for
25 the movie, they didn't think that the movie was

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1 telling the same actual story as the documentary did.
 2 Q. And your intention was that they should think
 3 that there's -- that the documentary and the Fox movie
 4 were telling the same story?
 5 A. No.
 6 MR. FLYNN: Object to form.
 7 A. No. That's not what I -- I just want them to
 8 understand that this was a Hollywood version so they
 9 would get a little more of a feel. But when you do a
 10 Hollywood version of a movie, you don't tell
 11 somebody's exact life story. You embellish it.
 12 Q. (BY MS. HAMILTON) So you wanted them to
 13 understand that it was a Hollywood version of the
 14 Scott O'Grady story?
 15 A. Yes.
 16 MR. FLYNN: Object to form.
 17 MS. HAMILTON: See if I can cut this
 18 down. It will work a lot faster.
 19 Let's mark this next exhibit.
 20 (Exhibit Number 338 marked.)
 21 Q. (BY MS. HAMILTON) And if you'd take a look
 22 at that, please.
 23 MS. HANDMAN: This is?
 24 MS. HAMILTON: 338.
 25 MR. FLYNN: 338.

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1 A. The purpose was to let Mr. Flynn know what
 2 the results of the pretest were.
 3 Q. Okay.
 4 MS. HAMILTON: And then let's go ahead
 5 and mark this as 339.
 6 (Exhibit Number 339 marked.)
 7 Q. (BY MS. HAMILTON) And I'd ask you to
 8 identify that document, please.
 9 A. It looks like -- it looks like the same
 10 document, except that there is some -- the answers to
 11 questions 1 and 6 in this document that were not in
 12 the previous document, 338.
 13 Q. I'm sorry?
 14 A. But otherwise, it's going to be the same.
 15 Q. The answers to questions 1 and 6 in Exhibit
 16 339 are not the same as the answers to questions 1 and
 17 6 in Exhibit 338?
 18 A. Wait a minute. I don't think I said that.
 19 MR. FLYNN: Here, let's get --
 20 Q. (BY MS. HAMILTON) That's why I want to -- I
 21 want to clarify it.
 22 A. No. Oh, I'm sorry. It wasn't a -- when I
 23 picked it up, I didn't see the -- it looks like the
 24 exact same --
 25 Q. Okay.

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1 MS. HAMILTON: 338.
 2 MR. FLYNN: You gave me two of these.
 3 MS. HAMILTON: I'm sorry?
 4 MR. FLYNN: You gave me two of these.
 5 MS. HAMILTON: I didn't mean to. Did
 6 Laura get one? Did I -- there may be --
 7 MS. HANDMAN: Yeah, I got it.
 8 MS. HAMILTON: -- extras.
 9 Q. (BY MS. HAMILTON) It's Bates labeled
 10 SOG 5460 on the first page; is that correct?
 11 A. Let me make sure we got that one. Yeah.
 12 Q. And Mr. Gelb, is this an E-mail that you sent
 13 on March 20th, 2003? The original message shows an
 14 E-mail from Gabe Gelb sent Thursday, March 20th, 2003
 15 at 11:08 a.m. Subject: Forward Bosnia pretest tab.
 16 And it says, Let's discuss. Is that correct?
 17 A. Yes.
 18 Q. And that's -- this is an E-mail that you
 19 sent?
 20 A. Yes.
 21 Q. With the attachment behind it, which is Bates
 22 labeled SOG 5461 through 5465?
 23 A. Yes.
 24 Q. Okay. And what was the purpose of this
 25 attachment?

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1 A. -- document.
 2 Q. But maybe this will clarify it. Exhibit 339
 3 is from you to George Bowles at Locke, Liddell. It's
 4 dated Thursday, March 20th, 2003 at 11:27 a.m. So I
 5 guess it's subsequent to Exhibit 338, which shows a
 6 time of 11:08 a.m.?
 7 A. Okay. What is the question?
 8 Q. I just -- I'm just trying to clarify. Is
 9 that correct, that this Exhibit 339 was sent shortly
 10 after Exhibit 338?
 11 A. Which exhibit?
 12 Q. 339 --
 13 A. Right.
 14 Q. -- was sent shortly after Exhibit 338.
 15 I'll clarify it further. Exhibit 338 was
 16 sent at 11:08 a.m. and Exhibit 339 was sent at 11:27
 17 a.m. Do you agree with that?
 18 A. Yes.
 19 Q. Okay. And on Exhibit 339 it says, Let's
 20 discuss, brackets, already sent to Peter and Roy,
 21 closed brackets.
 22 A. Right. Somebody either was not available or
 23 I messed up on the E-mail address and it didn't --
 24 it -- it was not received so I had to resend it.
 25 Q. Okay. Did you have a conference with counsel

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<p style="text-align: right;">Page 114</p> <p>1 for Mr. O'Grady regarding the Bosnia pretest that's 2 reflected in Exhibits 338 and 339? 3 A. I talked to them on the telephone. 4 Q. And who all was on the call, if you recall? 5 A. So far as I know, just Mr. Flynn. 6 Q. Okay. You did not have a discussion with 7 Mr. Bowles about the Bosnia pretest that's reflected 8 in Exhibit 339? 9 A. I don't think so. 10 Q. Okay. Or -- and you did not have a 11 discussion with Mr. Hardin about the pretest? 12 A. No. 13 Q. Okay. What was your discussion with 14 Mr. Flynn? 15 A. I told him that I thought we needed to change 16 that question 7. 17 Q. And if you look at question 7 -- let's look 18 at Exhibit 338. This is question 7: After seeing 19 this program, do you think the movie that was 20 advertised is or is not the actual pilot's real life 21 story. And then it says -- then there's number 8, Why 22 do you say that? So is that question 7 followed by 23 question 8? 24 A. Yes. 25 Q. Okay. And so the answer to question 7, After</p>	<p style="text-align: right;">Page 116</p> <p>1 Okay. So when you asked the question, After 2 seeing the program, do you think that the movie that 3 was advertised is or is not the actual pilot's real 4 life story, only six responded with a yes, and 13 5 responded, no, it is not; is that correct? 6 A. Yes. 7 MR. FLYNN: Object to form. 8 Q. (BY MS. HAMILTON) And what impact, if any, 9 did that have on you -- your changing the question? 10 MR. FLYNN: Object to form. 11 A. I think I discussed that I felt that when you 12 look at the why answers, that the people are answering 13 in extremely narrow form based on the -- the answers, 14 and that question needed to talk about a Hollywood 15 version of the pilot's real life story. 16 Q. (BY MS. HAMILTON) And did you discuss that 17 with Mr. Flynn? 18 A. Yes. 19 Q. And did he agree with you? 20 A. Yes. 21 Q. Okay. And the Hollywood version language was 22 your -- your suggestion? 23 A. Yes. 24 Q. Did you do any testing of any kind with 25 respect to the questions in your questionnaire other</p>
<p style="text-align: right;">Page 115</p> <p>1 seeing it, do you think the movie was advertised is or 2 is not the actual pilot's real life story. The 3 respondents said, yes, it is. That was a total of six 4 respondents who agreed that it was the actual pilot's 5 real life story? 6 A. Yes. 7 Q. And 13 did not think it was the actual 8 pilot's real life story? 9 A. That's right. 10 Q. And you have -- don't know is on page 3 and 11 that was zero; is that correct? 12 A. Yes. 13 Q. Okay. And is this document that's reflected 14 in Exhibit 338, which -- actually, that's the cover 15 page -- but it begins at SOG 5461 through 5465 a 16 summary of the results of the March pretest? 17 A. Yes. 18 Q. Okay. And are the comments that follow -- 19 again, back to SOG 5462, which is page 2 of the 20 tabulation, are the comments the ones that were 21 reflected in the March pretest research? 22 A. Yes. 23 Q. Okay. And were they taken down verbatim -- 24 A. Yes. 25 Q. -- from --</p>	<p style="text-align: right;">Page 117</p> <p>1 than the pretest that was done in Houston in March of 2 2003? 3 A. No. 4 Q. Okay. 5 MS. HAMILTON: Do you want to take a 6 break for lunch? 7 MR. FLYNN: How much more do you think 8 you have? 9 MS. HAMILTON: It should go quicker than 10 this morning, but it's going to take a little while. 11 Do you want to go off the record? 12 MR. FLYNN: Yeah, let's go off the 13 record. 14 THE VIDEOGRAPHER: Off the record at 15 12:30. 16 (Lunch break taken.) 17 THE VIDEOGRAPHER: We're back on the 18 record at 1:45 p.m. 19 Q. (BY MS. HAMILTON) So after the pretesting in 20 Houston on March, then there was a revision to 21 question number 7 to the survey questionnaire; is that 22 correct? 23 A. Yes. 24 Q. Okay. 25 MS. HAMILTON: And let's go ahead and</p>

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<p style="text-align: right;">Page 118</p> <p>1 mark as the next exhibit -- is it 339?</p> <p>2 THE REPORTER: 340.</p> <p>3 MS. HAMILTON: 340.</p> <p>4 (Exhibit Number 340 marked.)</p> <p>5 Q. (BY MS. HAMILTON) Give you a chance to look</p> <p>6 at that.</p> <p>7 And does Exhibit 340, which is dated</p> <p>8 March 24th, 2003 at the top, and it's Bates labeled</p> <p>9 Gelb 66 through 71, reflect the changes that were made</p> <p>10 to the que- -- questionnaire, from the March 6th</p> <p>11 questionnaire?</p> <p>12 A. Yes.</p> <p>13 Q. Okay. And the changes on question 7 and 7A,</p> <p>14 and that is -- change reads, After seeing this</p> <p>15 program, do you think that the movie that was</p> <p>16 advertised is or is not a Hollywood version of the</p> <p>17 actual pilot's real life story; is that correct?</p> <p>18 A. Yes.</p> <p>19 Q. Okay. And you reviewed that change -- I</p> <p>20 suggested -- I'm sorry, that change with counsel for</p> <p>21 Mr. O'Grady?</p> <p>22 A. Yes.</p> <p>23 Q. And they agreed with that?</p> <p>24 A. Yes.</p> <p>25 Q. Okay. And I notice on Gelb Bates labeled 71,</p>	<p style="text-align: right;">Page 120</p> <p>1 the information that was requested of the respondents</p> <p>2 who participated in your survey to -- not provided</p> <p>3 that to counsel and then relayed that on to the</p> <p>4 defendants, have you?</p> <p>5 A. That's correct.</p> <p>6 Q. Okay. And you've not provided the names of</p> <p>7 the interviewers who participated in this survey, have</p> <p>8 you?</p> <p>9 A. No.</p> <p>10 Q. And it is just your position that you --</p> <p>11 you've arbitrarily decided not to produce this</p> <p>12 information; is that correct?</p> <p>13 A. No. I think the courts have held not --</p> <p>14 myself that this information is not producible to</p> <p>15 anyone other than the research company.</p> <p>16 Q. And what courts are those?</p> <p>17 A. Pardon me?</p> <p>18 Q. What courts are those?</p> <p>19 A. You can see them in McCarthy.</p> <p>20 Q. Okay. Well, I'm going to put in a request</p> <p>21 because I think not only did we request it in the</p> <p>22 request for production, but you were also subpoenaed</p> <p>23 pursuant to the notice of deposition to provide us</p> <p>24 with all of the information and documentation that</p> <p>25 resulted from your work in this case, and we'll take</p>
<p style="text-align: right;">Page 119</p> <p>1 the last page of Exhibit 340, there is a closing that</p> <p>2 asks for the name, address and interviewer for the</p> <p>3 participants in the study; is that correct?</p> <p>4 A. Yes.</p> <p>5 Q. Is that the information that was sought?</p> <p>6 A. Pardon me?</p> <p>7 Q. Is that the information that was sought by</p> <p>8 that page -- by those questions?</p> <p>9 A. Yes.</p> <p>10 Q. And we were not provided with that</p> <p>11 information in the production, and I'd like to know,</p> <p>12 first of all, do you have that information in your</p> <p>13 possession?</p> <p>14 A. Yes.</p> <p>15 Q. And second of all, why hasn't it not been</p> <p>16 provided?</p> <p>17 A. Because that's standard operating procedure</p> <p>18 for all market research studies including those in a</p> <p>19 legal realm where we guarantee anonymity to the</p> <p>20 respondent.</p> <p>21 Q. And do you have a document that shows that</p> <p>22 you're guaranteeing anonymity to the respondent?</p> <p>23 A. Well, it says, Your name will not be used in</p> <p>24 any way in the introduction.</p> <p>25 Q. Okay. But beyond that, you have not provided</p>	<p style="text-align: right;">Page 121</p> <p>1 that up further.</p> <p>2 But at this point you're saying you -- you</p> <p>3 re- -- you refuse to produce that information; is that</p> <p>4 correct?</p> <p>5 A. That's correct.</p> <p>6 Q. And you would agree with me, would you not,</p> <p>7 that without that information, there is no way that</p> <p>8 anyone can go back in and verify the responses that</p> <p>9 are in this survey; is that correct?</p> <p>10 A. No, that's not correct.</p> <p>11 Q. So there is a way that the defendants can go</p> <p>12 in and verify the responses?</p> <p>13 A. Oh, no, you can't go in and verify the</p> <p>14 responses. That's -- as I'm trying to maintain, that</p> <p>15 is unethical according to the principles of our</p> <p>16 profession.</p> <p>17 But the person who validated the</p> <p>18 questionnaires talked to the majority of these people</p> <p>19 and testifies that they did take part in this survey.</p> <p>20 Q. Okay. But the -- so you're saying that it's</p> <p>21 unethical for the defendants to go in and find out --</p> <p>22 to verify the participants' responses?</p> <p>23 A. It's unethical for me to turn over these</p> <p>24 names to anyone.</p> <p>25 Q. Okay. So only you are privy to the</p>

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1 Q. Okay. Let's go to, I think, what's
2 previously been marked as Exhibit 335.
3 And while you take a look at that, I would
4 like to ask: Is that representative of the survey
5 that was done in Houston according to the March 24th,
6 2003 questionnaire?
7 A. Yes.
8 Q. And the numbers in the upper right-hand
9 corner, it says, Location, Houston, and then there is
10 a number 1022, are those the numbers of the -- that
11 were assigned to the participants?
12 A. Yes.
13 Q. Okay. And Exhibit 335 includes the revised
14 version of question 7, and that is, Do you think that
15 the movie that was advertised is or is not a Hollywood
16 version of the actual pilot's life story, correct?
17 A. Yes.
18 Q. Okay. And that's the question -- the form of
19 the question that you had decided to go forward with
20 for the survey?
21 A. Yes.
22 Q. And were you satisfied with the responses
23 that you got to question 7 in the survey?
24 MR. FLYNN: Object to form.
25 A. I have no opinion about responses one way or

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1 MS. HAMILTON: Objection, nonresponsive.
2 Q. (BY MS. HAMILTON) Does that answer comport
3 with the dictionary definition of the word "endorse"
4 that we discussed earlier today?
5 Let me answer it this -- ask it this way: It
6 does not comport with the dictionary definition of the
7 word "endorse," does it?
8 A. No.
9 Q. And in question number 11: When you say the
10 pilot endorses the movie, what do you mean by
11 endorses?
12 The response is: I think he agrees with the
13 story line because it had some kind of truth to it.
14 It was similar to his truth.
15 And what do you, if anything, make of that
16 response?
17 A. I think that's a good definition of the word
18 "endorses" from this individual's viewpoint.
19 Q. Okay. So all this is is a measure of how
20 this individual is responding to the word "endorse"
21 with respect to this movie; is that what you're
22 saying?
23 A. That's correct.
24 Q. And so the fact that there are similarities
25 I think you -- or there -- there was a truth to the

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1 another. I'm just there to do an objective survey.
2 Q. (BY MS. HAMILTON) Okay.
3 (Mr. Babcock leaves proceedings.)
4 Q. (BY MS. HAMILTON) If you would look at --
5 let's see this -- what is Bates labeled Gelb 836 in
6 Exhi- -- Exhibit 335. And when you have a chance, I'd
7 like to draw your attention to question number 9A,
8 which apparently the respondent answered that it
9 was -- the actual pilot endorses the movie. And then
10 question 10, Why do you say that the pilot endorses
11 the movie?
12 A. Right.
13 Q. And the response reads, Because I don't think
14 the movie portrayed him in a bad light. The movie
15 portrayed him as a hero for surviving behind enemy
16 lines.
17 Does that comport with the dictionary
18 definition of the word "endorse" that we discussed
19 earlier?
20 A. Well, as I have tried to maintain, I was not
21 interested in the -- I was not interested necessarily
22 in a dictionary definition of endorse but in whether
23 or not when people gave the answer as to why the
24 actual pilot endorses the movie, that it had some
25 representation of their personal truth.

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1 story and it was similar to his truth, in your mind,
2 is a good definition of endorse?
3 A. That's not what I said. I said this is the
4 respondent's definition of endorse. Not my
5 definition. I keep saying that. You ask me what my
6 definition is and I keep going back to the fact that
7 people said that -- those people who said that the
8 pilot endorsed gave their own personal definition of
9 how they saw that, not mine.
10 Q. Okay. Let's go on. Let's go to Gelb 871,
11 same document, Exhibit 335.
12 A. 871?
13 Q. Yeah.
14 A. Okay.
15 Q. This person also said that the -- responded
16 to question 9 and said that -- and then in question 10
17 it says: Why do you say that the pilot endorses the
18 movie? Answer: Because he was a part of the
19 documentary.
20 Do you know whether this person was talking
21 about the Discovery Channel documentary or whether he
22 was talking about the movie, Behind Enemy Lines, the
23 Fox movie?
24 A. This person uses the word "documentary." I
25 have to take this person at his or her word that he's

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<p style="text-align: right;">Page 130</p> <p>1 talking about the Discovery Channel. 2 Q. Okay. So he's not talking about the movie, 3 Behind Enemy Lines, correct? 4 A. This is his reason -- you have to tie 9A, 5 which is what he said with the reason behind it. You 6 said, he's not talking about the movie. But actually 7 in 9A, the person in 9 has said, The actual pilot 8 endorsed the movie. So you're -- you're trying to 9 separate out the quantitative answer from the 10 qualitative answer. You can't do that. 11 Q. Well, he's the one who uses the word 12 "documentary." 13 A. That's right. 14 Q. So I would assume he knows what he's talking 15 about? 16 A. That's what I'm saying. All these people 17 know what they're talking about. 18 Q. Okay. So he's referring to the documentary? 19 A. Right. 20 Q. Okay. And Gelb 960. The answer to 9A, that 21 person said, The actual pilot endorses the movie. And 22 the answer to question 10, the question is: Why do 23 you say that the pilot endorses the movie? And the 24 answer is: It seemed that it ran along the general 25 true story line. Is that correct?</p>	<p style="text-align: right;">Page 132</p> <p>1 A. -- why it doesn't say it's been redacted is 2 because it is standard operating procedure that it 3 would be unethical for me to give you the name of this 4 individual. 5 And as I have previously stated, this has 6 been the case with surveys conducted by other Jackson 7 and Walker attorneys, so I am confused by -- you keep 8 harping on this issue. 9 MS. HAMILTON: I'm going to object to 10 the responsiveness of the answer. 11 Q. (BY MS. HAMILTON) I'm just asking you, the 12 last page of each one of these questionnaires, 13 Exhibit 335 -- and if we need to, we'll go through the 14 others -- the final page of each one of the responses, 15 it does not contain that conclusion language nor does 16 it show on the document that it has been redacted from 17 the document, does it? 18 A. It doesn't show, right. 19 Q. And so we can't go back now and find out what 20 it is that that person did mean, can we? At least, 21 we, meaning the defendants, aren't able to do that, 22 are they? 23 A. You can't do that, and I can't do that. The 24 person gave his or her answer and we have to be 25 satisfied with that, which may or may not comport with</p>
<p style="text-align: right;">Page 131</p> <p>1 A. That's correct. And -- 2 Q. Okay. 3 A. -- a perfectly great answer for that specific 4 question. 5 Q. And so the fact that there are similarities 6 in the story line is sufficient to mean that he 7 endorsed the movie; is that your understanding? 8 MR. FLYNN: Object to form. 9 A. That's what he said, or she. 10 Q. (BY MS. HAMILTON) But you don't know if it's 11 a he or a she, do you? 12 A. That's right. No. Well, we knew it at the 13 time because we had the name on there. 14 Q. But the name's been taken off? 15 A. It doesn't make any difference whether it's a 16 he or a she. 17 Q. But the name's been taken off? 18 A. Oh, yes. 19 Q. And it doesn't say that it's been redacted, 20 it just isn't there; is that correct? 21 A. That is standard operating procedure. 22 Q. That's not my question. On Exhibit -- I'm 23 sorry. 24 A. The reason -- 25 Q. Exhibit --</p>	<p style="text-align: right;">Page 133</p> <p>1 the dictionary answer. 2 Q. And it's the answer that was taken down by 3 the interviewer? 4 A. Right. 5 Q. Correct. 6 Okay. Let's go on. 7 (Exhibit Number 341 marked.) 8 Q. (BY MS. HAMILTON) Just to clear up the 9 record back on 335, and this is true with these others 10 that I'm going to go through, I want to make sure that 11 these are true and correct copies of -- of the 12 documents that you have produced -- 13 A. Yes. 14 Q. -- in this litigation. Okay. 15 Exhibit -- 16 MS. HAMILTON: I'm sorry. What's the 17 number on this one? 18 MS. HANDMAN: 341. 19 Q. (BY MS. HAMILTON) -- 341 is a compilation of 20 the Bosnia Questionnaire, Gelb Consulting Group, Inc., 21 March 24, 2003, location, Baltimore, Consumer Pulse of 22 Baltimore; is that correct? 23 A. Yes. 24 Q. So that indicates the group that -- the 25 research group that did this survey for you?</p>

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1 A. Yes.
 2 Q. Okay. And again, it's the March 24th
 3 questionnaire. That was the one that you ultimately
 4 decided to go forward with with this survey; is that
 5 correct?
 6 A. Yes.
 7 Q. Okay. Draw your attention to document page
 8 Gelb 198. And this person answered, number one, to
 9 question 9A, The actual pilot endorses the movie.
 10 Question 10: Why do you say that the pilot endorses
 11 the movie? Quote, It's about him so it seems he did
 12 or should do so.
 13 Did I read that correctly?
 14 A. Yes.
 15 Q. Okay. And again, this does not comport with
 16 the dictionary definition of the word "endorse" we
 17 discussed earlier today, does it?
 18 A. With your dictionary.
 19 Q. It wasn't my dictionary.
 20 A. Well, it was. There are --
 21 Q. I'm not going to disagree.
 22 A. There's --
 23 Q. But we'll --
 24 A. -- 50 dictionaries. You brought out one.
 25 Q. No, I think --

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1 is that, It's about him or it seems he did or should
 2 do so.
 3 Do you take into consideration the fact that
 4 that -- you know, someone's judgment that he should
 5 endorse the movie because of the way they looked at
 6 this question?
 7 MR. FLYNN: Object to form.
 8 A. I -- I -- I don't believe you get the fact
 9 that we are talking to people of varying educational
 10 levels. This person could have been a cement mixer.
 11 You're asking him to take a word that he's never
 12 defined in the past and we've thrown this at him and
 13 he comes up with something that you say does not
 14 comport to the dictionary definition. I say that this
 15 is reality.
 16 Q. (BY MS. HAMILTON) Well, the answer stands.
 17 A. This is his reality or hers real -- or her
 18 reality.
 19 Q. Gelb 218.
 20 A. Okay.
 21 Q. And to go back on that, because it's an
 22 interesting point, it's -- it's the viewer's reality,
 23 so it's very subjective. It's not an object --
 24 objective test; is that correct?
 25 MR. FLYNN: Object to form.

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1 A. It's your dictionary.
 2 Q. Well, we'll go back to the exhibits then.
 3 There's a dictionary term and it was the
 4 Webster's, and then I believe it was the American
 5 Heritage dictionary --
 6 A. Okay. So I --
 7 Q. -- definition.
 8 A. -- will agree that this does not comport with
 9 the Webster's dictionary.
 10 Q. Definition of the word "endorse"?
 11 A. Right.
 12 Q. Right. And did it matter to you how people
 13 answered question 10 and 11.
 14 MR. FLYNN: Object to form.
 15 A. Well, it's kind of interesting that you read
 16 that: Why do you say that the pilot endorses the
 17 movie? And he or she says, It's about him so it seems
 18 he did or should do. And then when we say -- when you
 19 say the pilot endorses the movie, what do you mean by
 20 endorses? He says, Promotes the movie.
 21 Q. (BY MS. HAMILTON) Okay.
 22 A. Now, that, to me, should go along with 10,
 23 and it's a very clear kind of an answer.
 24 Q. Okay. But the question 10 is: Why do you
 25 say the pilot endorses? And the rational, I gather,

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1 A. I'm not going to characterize it as -- if you
 2 make a statement, if you consider that subjective and
 3 not objective, I would say that, for the same
 4 reasoning, this person is making a subjective
 5 statement. If -- if you'll go along with the fact
 6 that when you make statements, they are subjective
 7 also.
 8 Q. (BY MS. HAMILTON) Okay. But if they're
 9 speaking from their personal view of the world --
 10 A. Right.
 11 Q. -- which is what you said you were after --
 12 A. Right.
 13 Q. -- that would be a subjective view, would it
 14 not?
 15 A. I would agree with that.
 16 Q. Back to Gelb 218. I think you're already
 17 there. Question 10: Why do you say -- say that the
 18 pilot endorses the movie? Answer: I think if I was
 19 him and had this experience, I would want others to
 20 know what happens. Did I read that correctly?
 21 A. Right.
 22 Q. Now, again, when you compiled the answers
 23 from these research -- from this survey --
 24 A. Right.
 25 Q. -- so long as someone answered 9 or 9A,

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<p style="text-align: right;">Page 138</p> <p>1 answer one, that the actual pilot endorses the movie, 2 it didn't matter what they put down as their 3 explanation for why they thought the pilot endorses 4 the movie, did it? 5 MR. FLYNN: Object to form. 6 A. Largely true. But it also -- it's also true 7 that you have to take 10 in context. And again, 8 you're leaving out 11. The same person said -- when 9 we asked him, When you say the pilot endorses the 10 movie, what do you mean by endorses? In question 11, 11 he says: He's for people seeing what happened. I 12 think that's -- 13 Q. (BY MS. HAMILTON) I agree with that. 14 A. -- a logical -- that -- from his viewpoint, 15 that's a logical statement. It may not comport to 16 your dictionary, but again, that's what he says. 17 Q. Now, he says that, but do you -- 18 A. Right. 19 Q. -- know what he's even referring to? 20 A. No, I don't know what he's referring to. 21 Q. Okay. 22 A. Except from the question -- 23 Q. Let's look -- 24 A. -- we asked. 25 Q. And let's go to Gelb 233.</p>	<p style="text-align: right;">Page 140</p> <p>1 about the movie. Because it says, because it was 2 portrayed more accurately and so it really happened. 3 And then he says he feels it was a good depiction of 4 the story. 5 Now, we had asked him, Why do you say the 6 pilot endorses the movie? He's saying he feels it was 7 good depiction of the story. 8 Q. Well, I'll go along with Mr. Flynn's feeling 9 because "it" seems somewhat ambiguous. It is not 10 clear whether this person is responding to the movie, 11 the Fox movie, Behind Enemy Lines, or is he responding 12 to the documentary that -- that was on the Discovery 13 Channel, correct? 14 MR. FLYNN: Objection, argumentative. 15 A. The -- the person said that he felt that the 16 actual pilot endorses the movie that was advertised on 17 the program you just saw. 18 Q. (BY MS. HAMILTON) But -- now, that is not -- 19 A. And then we say -- 20 Q. -- in the document, is it, Mr. Gelb? 21 A. Pardon me? 22 Q. That's not in the document -- 23 MR. FLYNN: Objection, argumentative. 24 Q. (BY MS. HAMILTON) -- is it, Mr. Gelb? 25 A. Yes, that's the question that was asked him.</p>
<p style="text-align: right;">Page 139</p> <p>1 A. Okay. 2 Q. Question 10: Why do you say the pilot 3 endorses the movie? Because it was portrayed more 4 accurately and as it really happened. He feels it was 5 a good depiction of the story. 6 Do you know whether that person's -- you 7 don't know whether that person's responding to the 8 Discovery Channel documentary or the movie -- the Fox 9 movie, Behind Enemy Lines, do you? 10 MR. FLYNN: Object to form. 11 A. No. They -- they were both in the same 12 program. 13 MS. HAMILTON: What was your objection, 14 Peter? 15 MR. FLYNN: Just what you were -- the 16 reference in your question. You said, do you know 17 what -- what "it" was, I believe is the word you used. 18 The question was vague. 19 MS. HAMILTON: Well, leave it. 20 A. Well, I mean, he -- the question is: Why do 21 you say the pilot endorses the movie? So -- 22 Q. (BY MS. HAMILTON) They didn't see the -- 23 A. -- and the conte- -- 24 Q. -- movie. But -- 25 A. The connotation here is that he's talking</p>	<p style="text-align: right;">Page 141</p> <p>1 Q. Well, I was reading -- 2 A. Yeah. 9A. 3 Q. Okay. Go back to question 10. 4 A. Okay. 5 Q. Why is it that you say that the pilot 6 endorses the movie? The response: Because "it" was 7 portrayed more accurately and as "it" really happened. 8 He feels "it" was a good depiction of the story, 9 period. 10 Now, you don't know what the "it" is that 11 this respondent is referring to, do you? 12 A. That's correct. 13 Q. And with question 11, it says, He agrees "it" 14 is an account -- I'm sorry. The answer is: He agrees 15 "it" is an accurate account and "it" is a good job of 16 what really happened, period. "It" is not like, 17 quote, Hollywood, closed quote, made-up version. 18 Did I read that correctly? 19 A. Right. 20 Q. So again, you don't know what the "it" is 21 that he is referring to, do you? 22 A. That's correct. 23 Q. And it could as easily be the Discovery 24 Channel documentary, could it not? 25 A. That's correct. But his answer was, The</p>

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1 actual pilot endorses the movie, and these are
2 explanations of that answer.

3 Q. I understand what the answer is to 9A. I'm
4 talking about the answer to 11.

5 A. I know, but we do not take these things out
6 of context.

7 Q. Let me ask you this: Why did you ask these
8 questions, 10 and 11?

9 A. To find out what was on the minds of the
10 individual when they asked -- answered the question.

11 Q. And were they -- they -- were they asked what
12 was on their minds beyond what's on question 10 and
13 11?

14 A. What do you mean, were they asked what was on
15 their minds? They were asked, Why do you say the
16 pilot endorses the movie.

17 Q. Okay. And even if it is ambiguous --

18 A. Right. It's ambiguous to you. It was not
19 ambiguous to that person. We keep going back to --
20 you are parsing this as though it's a legal document.
21 It is not a legal document.

22 It is an answer by someone who, as I say
23 before, does not necessarily have a law degree or even
24 a college degree.

25 Q. Mr. Gelb, because we're not able to go back

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1 Q. (BY MS. HAMILTON) Gelb 239. Turn to that
2 page, please.

3 A. Okay.

4 Q. Same thing, answer to question 10: Why do
5 you say that the pilot endorses the movie? Answer: I
6 don't think they would be able to release it if he
7 didn't endorse the movie.

8 Does that answer, as it is -- would have been
9 included in your compilation or your final ta -- you
10 called it a tabulation?

11 A. Tabulation.

12 Q. Okay. In the tabu -- tabulation, correct?

13 A. Yes.

14 Q. Did you take into consideration, for example,
15 the answer to Number 11, which is -- the question is:
16 When you say the pilot endorses the movie, what do you
17 mean by endorses? And the answer is: Meaning
18 allowing it to be shown.

19 Was any consideration given to the -- sort of
20 en -- the difference between the legal term of
21 endorsement and just permission about whether or not
22 somebody can show a movie?

23 MR. FLYNN: Object to form.

24 A. Would you explain what you mean by the legal
25 definition of endorsement?

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1 in and ask these people these questions, I don't know
2 and I can't find out what it is -- what kind of
3 educational level this person had, I don't -- I
4 can't -- correct? Is that correct?

5 A. You cannot find out, yes.

6 Q. Okay. And I cannot find out whether or not
7 it was ambiguous to this individual at the time, can
8 I?

9 A. No. But I want to --

10 Q. And do you know whether it was ambiguous to
11 this person at this time or not? You don't, do you?

12 A. Right.

13 Q. But --

14 A. But --

15 Q. -- these responses were included in the
16 compilation and tabulation of your survey, were they
17 not?

18 A. Yes. And that's the difference between a
19 survey and the examination of a fact witness.

20 MS. HAMILTON: Objection to the final
21 part about the difference between a survey and
22 examination of a fact witness.

23 A. Well, you're treating this as though this
24 individual is up on the stand here. This is not what
25 this is all about.

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1 Q. (BY MS. HAMILTON) Okay. Well, we'll move on
2 to another question.

3 Do you think that -- was any consideration
4 given to separating out the general confusion that
5 might be in the population about the word
6 "endorsement"?

7 MR. FLYNN: Object to form.

8 A. You will remember that all of these people
9 were allowed to say I don't know. And if they said I
10 don't know about endorsement, they were not asked 10
11 and 11.

12 Q. (BY MS. HAMILTON) Okay. Did you do a
13 control on this survey?

14 A. No.

15 MR. FLYNN: Object to form.

16 MS. HAMILTON: What's your objection,
17 Peter?

18 MR. FLYNN: What do you mean by
19 "control"?

20 MS. HAMILTON: I think it's --

21 Q. (BY MS. HAMILTON) Well, what is your term --
22 understanding of the word "control," Mr. Gelb?

23 A. Well, control -- you can have a control in --
24 within the survey that asks a question that you
25 believe disqualifies some people, which we did have in

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1 this survey.
 2 Or you could have a control of asking a
 3 second group of people some questions, which would be
 4 completely irrelevant to this survey.
 5 So there is certain instances when you use a
 6 control and there is certain instances when you don't
 7 use a control.
 8 Q. Okay. So you're familiar with the term
 9 "control"?
 10 A. Yes.
 11 Q. And what was the question that you used in
 12 this survey -- I think you referred that there was one
 13 that you used in this survey?
 14 A. Right.
 15 Q. Which question is that?
 16 A. That was -- it was question 2.
 17 Q. And that is: In your opinion, after seeing
 18 this program, did the program tell about an event that
 19 actually took place or not?
 20 A. Right.
 21 Q. And how is that a control?
 22 A. If the person said that he didn't believe
 23 that the program told about an actual event, that
 24 meant that he had a problem with understanding that
 25 program, perhaps, through a language difficulty or

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1 A. What's going on here is that people are
 2 showing -- have been shown a documentary or what's
 3 sometimes call a docudrama and they're asked questions
 4 about it. And if they didn't understand that it was a
 5 documentary or a docudrama, then we felt that they had
 6 a language or other problem.
 7 Q. And why was it important -- why was it
 8 important that they understood that it was a
 9 documentary or a docudrama?
 10 A. That was a control question to see whether or
 11 not the person had complete comprehension of the
 12 nature of the program.
 13 If they didn't have comprehension of the
 14 nature of the program, then later questions would --
 15 would be questionable.
 16 Q. Are you talking about -- I'm sorry -- later
 17 responses would be questionable?
 18 A. Yes. Thank you.
 19 Q. And you don't find that any of the responses
 20 that you received in response to question 7 or 9 were
 21 questionable?
 22 MR. FLYNN: Object to form.
 23 A. No. As I had mentioned to you, this -- these
 24 are the perceptions of ordinary people that range from
 25 those who have an elementary school education to those

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1 some other reason. And if he or she said, I'm not
 2 sure the program is about an actual event, we also
 3 decided that that person should not be included in the
 4 survey.
 5 And so the control was that unless people
 6 said they believe that the program told about an
 7 actual event and thus had an understanding of the
 8 program, we took them out of the survey.
 9 Q. And so the control was whether or not they
 10 had an understanding that the program was about an
 11 actual event?
 12 A. Yes.
 13 Q. But you didn't do any -- was there any
 14 control on the issue of endorsement?
 15 A. No need for any control. You're asking a
 16 very specific question and you're giving people the
 17 ability to say I don't know.
 18 Q. If you were to ask that question about
 19 endorsement --
 20 A. You don't have a control on every question.
 21 You have a control either for the entire group or you
 22 have something in the front that removes people who
 23 are not understanding what's going on here.
 24 Q. How is it that -- what is really going on
 25 here?

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1 who have professional degrees, and the way that they
 2 answer these questions cannot be measured against the
 3 dictionary definition, particularly when the word is
 4 "endorse," which is something that I think even
 5 attorneys would have some differing views on.
 6 Q. Then under that analysis, you would agree
 7 that the word "endorse" is ambiguous, would you not?
 8 A. All words can be used ambiguously.
 9 Q. I'm not talking about use. I'm just saying
 10 the word is ambiguous.
 11 A. There is no such thing as a word without use.
 12 Q. Gelb 249, please. Never mind. Sorry about
 13 that.
 14 Let's look at 250. Answer to question number
 15 10: Why do you say the pilot endorses the movie?
 16 Quote, he gave out details and cooperated within the
 17 movie, closed quote.
 18 Now, you did not show the participants the
 19 movie, Behind Enemy Lines, did you?
 20 A. That's correct.
 21 Q. And so to the extent they saw Scott O'Grady,
 22 it was in the Discovery Channel program, correct?
 23 MR. FLYNN: Object to form.
 24 Q. (BY MS. HAMILTON) Well, to the extent that
 25 they saw Scott O'Grady in the November 28th broadcast,

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1 it was in the Discovery Channel program, correct?
 2 A. Yes.
 3 Q. So in answer to question number 10, this
 4 respondent -- it's not clear whether this respondent
 5 is responding to the Discovery Channel program or the
 6 Fox movie, is it?
 7 MR. FLYNN: Object to form.
 8 A. This is exactly what Captain O'Grady is
 9 complaining about, that after seeing this -- and this
 10 person has said it very specifically, as a matter of
 11 fact. After seeing this program, he comes across that
 12 Captain O'Grady has cooperated with the movie.
 13 MS. HAMILTON: Objection, nonresponsive.
 14 Q. (BY MS. HAMILTON) Let's go to Gelb 268.
 15 A. You're -- you want to pass by his answer to
 16 question 11?
 17 MR. FLYNN: Just --
 18 Q. (BY MS. HAMILTON) No, we've got --
 19 MR. FLYNN: -- go with her question.
 20 THE WITNESS: Okay.
 21 Q. (BY MS. HAMILTON) We'll just keep going.
 22 A. Okay. We had a pattern there.
 23 268?
 24 Q. 268.
 25 A. Okay.

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1 Q. Question 10: Why do you say the pilot
 2 endorsed this movie? Answer: It is about him so he
 3 endorses it.
 4 Now, again, the word "it," do you know -- you
 5 can't tell whether he's talking about the movie,
 6 Behind Enemy Lines, or the Discovery Channel
 7 documentary, can you?
 8 A. Well, I go with my question. The question
 9 was: After seeing the program, do you think the
 10 actual pilot doesn't endorse or does endorse the movie
 11 that was advertised in the program you just saw.
 12 It is about him so he does endorse it.
 13 He comes away from seeing that program and
 14 saying that -- after asked: Why do you say the pilot
 15 endorses the movie? "It" -- to me, meaning the
 16 movie -- is about him so he does endorse it.
 17 Q. Okay. So the movie is about Scott O'Grady?
 18 A. That's what --
 19 Q. Is that your understanding?
 20 A. -- this person thinks. Yeah.
 21 Q. And how do you know what this person thinks?
 22 A. That's what I get from the context of the
 23 question I asked and the answer that he gave.
 24 Q. And that's your interpretation of the answer,
 25 isn't it?

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1 A. But I am merely reporting that in my report.
 2 I am not interpreting what he said. Again, this is
 3 not in my opinion.
 4 Q. Let's go to Gelb 299. Question 10: Why do
 5 you say that the pilot endorses the movie? Answer:
 6 To show how rough it was for him and how wonderful it
 7 was that the others came for him.
 8 You can't tell me from this answer as it
 9 stands on this piece of paper whether this respondent
 10 is talking about the Discovery Channel documentary or
 11 the Fox movie, Behind Enemy Lines, can you?
 12 A. This is the answer -- his answer to the
 13 question: Why do you say that the pilot endorses the
 14 movie? That's all I can tell.
 15 Q. Okay. Let's go on to Los Angeles.
 16 MS. HAMILTON: It's going to be 342.
 17 (Exhibit Number 342 marked.)
 18 Q. (BY MS. HAMILTON) And I'll ask you: Is this
 19 a true and correct copy of the questionnaires that
 20 were used in the research that was done in Los
 21 Angeles?
 22 A. Yes.
 23 Q. Okay. And let's look at Gelb 667.
 24 MR. FLYNN: 667?
 25 MS. HAMILTON: Uh-huh.

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1 MR. FLYNN: Mine starts with 669.
 2 MS. HAMILTON: Yours starts with 669?
 3 Yeah, I know. I'm sorry. It's Exhibit -- you know
 4 what, they got out of order.
 5 MS. HANDMAN: They got out of order.
 6 MS. HAMILTON: They may be out of order.
 7 Let's forget that.
 8 MS. HANDMAN: It's in there.
 9 MS. HAMILTON: That's all right. We can
 10 go -- we'll go on to another one.
 11 MS. HANDMAN: Here's -- it -- it's
 12 here.
 13 MS. HAMILTON: No. I know. We'll just
 14 go on.
 15 MS. HANDMAN: Okay.
 16 Q. (BY MS. HAMILTON) Let's go to 652.
 17 MR. FLYNN: This is all out of order.
 18 A. They're out of order.
 19 Q. (BY MS. HAMILTON) Sorry.
 20 A. But -- but we -- but we can find it. I'm
 21 not -- let's find it.
 22 Q. I've got mine posted so I know where I'm
 23 going.
 24 A. 662.
 25 Q. 652. I'm sorry.

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1 A. Oh, -52. Got it.
 2 Q. Okay. Now, I apologize. I don't know why
 3 these are all out of order, but...
 4 Question 10: Why do you say the pilot
 5 endorses the movie? Answer: Because it explains how
 6 he survived the actual experience that he went
 7 through.
 8 Was -- that answer would have been included
 9 in your tabulation under the endorsement column,
 10 wouldn't it?
 11 A. Yes.
 12 Q. Okay. And question 11: When you say the
 13 pilot endorses the movie, what do you mean by
 14 endorses? Answer: Um -- that's U-M -- I guess it
 15 means agreeing to make a movie of what he experienced.
 16 Now, the only thing that the participants
 17 were shown was the -- other than the ads for the
 18 movie, Behind Enemy Lines, they didn't see the movie,
 19 Behind Enemy Lines, but they did see the
 20 documentary --
 21 A. Right.
 22 Q. -- about Scott O'Grady.
 23 So is it conceivable to you that the answer:
 24 Because it explains how he survived the actual
 25 experience that he went through, is a reference to the

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1 know it's mixed up.
 2 A. Is this before or after?
 3 Q. It's afterwards.
 4 A. Okay.
 5 MR. FLYNN: The Bates?
 6 MS. HAMILTON: 607.
 7 MR. FLYNN: After what we just looked
 8 at?
 9 THE WITNESS: Yeah.
 10 MS. HAMILTON: Uh-huh.
 11 A. I got it.
 12 Q. (BY MS. HAMILTON) Question: Why do you say
 13 the pilot endorses the movie? Quote, He speaks during
 14 the movie and I've seen it in news reports on what had
 15 happened.
 16 So this would be included in -- in your
 17 tabulation under the endorsement --
 18 A. Right.
 19 Q. -- column?
 20 A. Right.
 21 Q. And without regard to the clarity of what is
 22 being said in response to question 10, correct?
 23 A. People are not as -- don't communicate as
 24 much clarity as we do, unfortunately.
 25 Q. Well, but it -- the clarity didn't matter to

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1 documentary and not to the movie?
 2 A. All I can tell you, that he answered the
 3 question that the actual pilot endorses the movie and
 4 this is what he said.
 5 Q. Okay. And you -- and the question is -- you
 6 don't ask them, Why do you say the pilot endorses the
 7 movie Behind -- the Fox movie, Behind Enemy Lines --
 8 A. Right.
 9 Q. -- do you?
 10 You just ask "the movie"?
 11 A. Right.
 12 Q. And so you have --
 13 A. Wait a second. No.
 14 Q. I'm sorry?
 15 A. The movie that was advertised on the program
 16 you just saw.
 17 Q. Okay.
 18 A. I mean, let's have that context clear.
 19 Q. Okay. That's fine.
 20 There were other movies that were advertised
 21 on the program, were there not?
 22 A. I think there was some Discovery programs
 23 advertised. I don't know about movies.
 24 Q. Okay. Gelb 607. And again, if we go through
 25 this -- I won't go through many on these because I

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1 you when you tabulated the answers, did it?
 2 A. I wouldn't say it didn't matter to me, but
 3 you see it in a different light than I see it. That's
 4 our problem here.
 5 Q. It did not affect the tabulation?
 6 A. No. I listed that in the tabulation.
 7 Q. Okay. And one last one on this document. If
 8 you go -- it's further to the back -- Gelb 547.
 9 A. Got it.
 10 Q. Okay. Question: Why do you say the pilot
 11 endorses the movie? Answer: Because they are showing
 12 you what happened in the war, comma, they are
 13 reenacting the real story so that we can see what
 14 actually happened since we can't be there, period.
 15 Did I read that correctly?
 16 A. Yes.
 17 Q. And again, can you -- you can't tell from
 18 this answer whether they are responding to the
 19 Discovery Channel documentary or to the Fox movie,
 20 Behind Enemy Lines, can you?
 21 A. I can tell you that they are responding to
 22 the question about the movie that, quote, was
 23 advertised on the program you just saw.
 24 Q. But can you tell me whether or not this
 25 response references the movie or the docudrama -- I'm

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1 sorry, the documentary?
 2 A. I can't tell you for sure.
 3 Q. Okay. Sorry. Back up to page 576.
 4 A. This is before?
 5 Q. Yeah. Let me look at this one.
 6 A. How much before?
 7 Q. Oh, probably 20 pages.
 8 A. 576?
 9 Q. Uh-huh.
 10 A. Okay. I got that one fast.
 11 Q. Okay. That's question 7. Now, at the top of
 12 that page where there's an "X", I'm assuming that
 13 means that was the version of the question 7 or 7A and
 14 the "X" would denote which one, 7 or 7A, was used?
 15 A. Correct.
 16 Q. Okay. And this is the question: After
 17 seeing this program, do you think that the movie that
 18 was advertised is not or is a Hollywood version of the
 19 actual pilot's real life story. I'm sorry. I read
 20 that incorrectly.
 21 I got to go up to 7. After seeing this
 22 program, do you think that the movie that was
 23 advertised is or is not a Hollywood version of the
 24 actual pilot's real life story?
 25 Did I read that correctly?

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1 A. Okay. We're going from --
 2 Q. It's question --
 3 A. -- 9 to 7? You're switching?
 4 Q. Yes, I'm on que- -- question 7.
 5 A. Okay. You're switching to 7 now?
 6 Q. Uh-huh.
 7 A. Okay. I got it.
 8 MR. FLYNN: Why don't you ask the
 9 question again.
 10 Q. (BY MS. HAMILTON) Just the ques- -- they're
 11 asked about question 7.
 12 A. Okay.
 13 Q. Not 7A, correct?
 14 A. Yes.
 15 Q. Okay. And apparently they have answered,
 16 yes, it is a Hollywood version of the actual pilot's
 17 real life story. Do I understand that?
 18 A. That's right.
 19 Q. And then question 8: Why do you say that?
 20 A. Right.
 21 Q. Answer: The trailers for the movie had a lot
 22 more action than the actual event had.
 23 A. Right.
 24 Q. So they're making a judgment off of the
 25 action in the trailers as opposed to the substance of

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1 the movie; is that correct?
 2 MR. FLYNN: Object to form.
 3 A. I don't know. I guess so. Yeah.
 4 Q. (BY MS. HAMILTON) Because they don't know
 5 what the substance of the movie is because they
 6 haven't seen the movie, have they?
 7 A. Right.
 8 MR. FLYNN: Object to form.
 9 A. Well, some of them have seen the movie.
 10 Remember? You know, we asked if they had seen the
 11 movie.
 12 Q. (BY MS. HAMILTON) Okay. Well, this person
 13 answered no.
 14 A. This person did not see the movie, but some
 15 of them did.
 16 Q. But he's talking about -- when he's talking
 17 about the trailers, he's talking --
 18 A. He's talking about what he's --
 19 Q. -- about the Hollywood version, right?
 20 A. Yes. Right. Right.
 21 MS. HAMILTON: What's the next one, 342?
 22 THE REPORTER: 343.
 23 MS. HAMILTON: 3? 343.
 24 (Exhibit Number 343 marked.)
 25 Q. (BY MS. HAMILTON) Hopefully these are in

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1 order.
 2 If you would turn -- first of all, this is
 3 the questionnaire, the survey, I guess, responses to
 4 the March 24th, 2003 questionnaire from the testing
 5 site in Milwaukee, Wisconsin; is that correct?
 6 A. Yes.
 7 Q. And if you turn to Gelb 1039, please.
 8 A. Got it.
 9 Q. And in answer to question 10: Why do you say
 10 the pilot endorses the movie?
 11 Answer: Because he knew that showing that
 12 show would help someone out and also show them how to
 13 handle the situation, so why keep it a secret when you
 14 know.
 15 A. Right.
 16 Q. And I -- and then there's some initials. Are
 17 those the interviewer's initials; do you know? Or do
 18 you know what that means?
 19 A. No. That means that they -- A/E means
 20 anything else.
 21 Q. They asked anything else?
 22 A. Right.
 23 Q. Is that -- and then the response was no?
 24 A. That's right.
 25 Q. Okay. I didn't notice that notation with the

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1 other cities. Okay. Do you know if, in the other
2 cities, anything was -- else was asked as a follow-up?

3 A. I don't think it was.

4 Q. So this answer would -- would fall into your
5 endorsement column on your tabulation; is that
6 correct? It's the answer to number 10 on Gelb 1039.

7 A. Well, again, 10 goes with 11.

8 Q. Okay. But it was included in the tabulation
9 for your survey results under the endorsement column?

10 A. Yes.

11 Q. And 11 says: When you say the pilot endorses
12 the movie, what do you mean by endorses? Answer:
13 That he let them know it was okay to show the
14 struggles in how to make it out there. And I guess
15 this A, slash, E: He gave them permission to make his
16 life story public.

17 Do you know -- that would be true of the --
18 do you know whether or not he's referring to the
19 Discovery Channel program or to the Fox movie?

20 MR. FLYNN: Object to form.

21 Q. (BY MS. HAMILTON) Or she, whoever the
22 respondent is.

23 A. When -- when you ask me all these questions,
24 do I know what he or she is referring to, all I can do
25 is go back to the question, and this is the answer

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1 Q. (BY MS. HAMILTON) You said the omission
2 issue, that if you don't speak out against something
3 it means you endorse it.

4 A. That -- that is one interpretation, yes. And
5 that's what this person seems to be saying.

6 Q. Okay. Go to Gelb 1173, back end.

7 A. Okay.

8 Q. And the answer to 10: Why do you think the
9 pilot -- say that the pilot endorses the movie? The
10 answer is: Actual footage of what the plane being
11 shot down was part of the movie.

12 And so again, the -- that statement in and of
13 itself is enough to include it in the endorsement
14 column on your tabulation, correct?

15 A. No. That statement is enough to include it
16 after the person says that the actual pilot endorsed
17 the movie.

18 Q. Right. Because that's -- I'm sorry.

19 That's -- that's the most important part --

20 A. Right.

21 Q. -- for you?

22 The -- the explanation doesn't make any
23 difference to you one way or the other, does it?

24 MR. FLYNN: Object to form.

25 A. The explanation is in the minds of the

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1 that he or she gave. I can't interpret any more than
2 that.

3 Q. Okay. So again, the response doesn't factor
4 into your ultimate tabulation as far as the written
5 response? All that matters is that they checked
6 the -- or answered the question that the pilot
7 endorsed the movie?

8 A. In general, yes.

9 Q. If you go to Gelb 1089. And the answer to
10 question 10: Why did you say the pilot endorses the
11 movie? Is, quote, Because he didn't say anything bad
12 about the movie. He was neutral.

13 Did I read that correctly?

14 A. Yes. And I had made the earlier statement
15 that sometimes people think something is endorsed if
16 someone doesn't speak out against it or they just
17 accept it and this is -- this is one of those answers.

18 Q. And -- and that's one of the many examples of
19 how you think various people might interpret the word
20 "endorsement;" is that correct?

21 MR. FLYNN: Object to form.

22 A. I don't know what you mean by, that's one of
23 the many answers.

24 Q. I'm sorry, examples.

25 MR. FLYNN: Object to form.

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1 individual who made that statement. I'm not here to
2 critique it --

3 Q. (BY MS. HAMILTON) Okay.

4 A. -- as perhaps you are.

5 Q. If you go to Gelb 1172, the page ahead of it.
6 And I'd ask you to look at question 7. And that's the
7 question that refers to the Hollywood version of the
8 actual pilot's real life story.

9 A. Right.

10 Q. Question 8: Why do you say that? Answer:
11 Quote, It is a dramatization of the actual event.

12 A. Pretty clear to me, if you're asking me.

13 MR. FLYNN: Well, wait for the question.

14 THE WITNESS: Well, she's looking at me.

15 Q. (BY MS. HAMILTON) I'll ask you, what is --
16 what is -- what is clear to you?

17 A. That person says that -- they answered --
18 again, you left out -- in answer to the question, yes,
19 it is a Holly- -- a Hollywood version of the actual
20 pilot's real life story. And they say, Why? It is a
21 dramatization of the actual event. I don't know how
22 we can get any more clearer than that.

23 Q. So according to this person's understanding,
24 it would seem that a dramatization of a real, actual
25 event is a Hollywood version?

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1 A. I guess you can read it that way.
 2 Q. Okay.
 3 MS. HAMILTON: Let's go ahead and take a
 4 break.
 5 THE VIDEOGRAPHER: Off the record at
 6 2:55. This concludes the end of Tape Number 2.
 7 (Exhibit Number 344 marked.)
 8 THE VIDEOGRAPHER: This is Tape Number 3
 9 in the deposition of Gabriel Gelb. We are back on the
 10 record at 3:13.
 11 Q. (BY MS. HAMILTON) Mr. Gelb, would you take a
 12 look at what's been marked as Exhibit Number 344, and
 13 tell us what that document is.
 14 A. This is a code sheet.
 15 Q. Okay. What's a code sheet?
 16 A. Well, basically you're looking to categorize
 17 the answers, because when you do a report, you can't
 18 have every single verbatim listed. It gets confusing
 19 and they don't see the main points.
 20 So what we do is, we go through the first
 21 number of questionnaires. We see what the answers are
 22 and we see what are repeated and then we construct
 23 this, and then all of the answers that come in later
 24 are given a numerical number. So it makes it easier
 25 to tabulate.

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1 had a Hollywood movie here as opposed to a
 2 documentary.
 3 Q. Okay. Did you --
 4 A. That's a --
 5 Q. I'm sorry?
 6 A. It's when you have a story of Gandhi or JFK
 7 or Martin Luther King and it's done by Hollywood, it's
 8 a Hollywood version.
 9 Q. Okay. Did you provide the res- -- you didn't
 10 provide the participants with that definition of a
 11 Hollywood version, did you?
 12 A. No.
 13 Q. And you didn't make a distinction between
 14 television shows out of Hollywood versus Hollywood
 15 movies, did you?
 16 A. No. But we've been talking about movies
 17 throughout.
 18 Q. Okay. And earlier, I think you said that
 19 there were two types of controls; one, you said that
 20 you did address in the questionnaire, and the other
 21 was a control that would be a separate test?
 22 A. Yes. I'll give you an example. If we are
 23 asking people about cars and we are -- want to get
 24 awareness of, say, the Kia, Subaru and the Barrett, if
 25 someone said Barrett, we would throw that

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1 Q. So the response sheets that we've just gone
 2 through, there is a number --
 3 A. Questionnaires.
 4 Q. The questionnaires, if there is a number out
 5 to the side, that reflects --
 6 A. Code.
 7 Q. -- the code --
 8 A. Yeah.
 9 Q. -- that is in Exhibit Number 344?
 10 A. Yeah.
 11 Q. Okay. And so these aren't the number of
 12 responses, like on, say, question 6?
 13 A. Oh, no, no.
 14 Q. This is just the code that was given to --
 15 A. Yeah.
 16 Q. -- each one of those --
 17 A. Yeah. You need a code --
 18 Q. -- responses?
 19 A. -- for computer tabulation.
 20 Q. Okay.
 21 A. That's basically what it is.
 22 Q. Okay. I don't believe I asked you this
 23 earlier, but what did you mean by "Hollywood version"?
 24 That was the term in -- in question number 7.
 25 A. That was my idea to try to indicate that we

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1 questionnaire out because there isn't any so he was
 2 basically just guessing. I mean, that's one type of
 3 control.
 4 Q. Did you consider an outside control for this
 5 study?
 6 A. Well, by outside, you mean having another
 7 sample which is another way of doing a control?
 8 Q. A separate sample from what --
 9 A. Right.
 10 Q. -- you did?
 11 A. No, I did not. That is not applicable here.
 12 Q. And why isn't it applicable?
 13 A. Because you are -- there -- there is no way
 14 to do an outside control. I mean, what would you do?
 15 You would have them see another program and ask them
 16 questions about it. I mean, it doesn't -- it doesn't
 17 relate here at all.
 18 Q. Okay. Are you familiar with the television
 19 program Hot Ticket?
 20 A. No.
 21 Q. Okay. Were you aware of Mr. O'Grady's
 22 appearance on the television program Hot Ticket?
 23 A. Yes.
 24 Q. And what did you know about that appearance?
 25 A. Mr. Flynn told me about that yesterday. He

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1 A. Right.
2 Q. But then you would show one group the
3 documentary and, say, an advertisement prepared by
4 Fox about the movie to see, in essence, whether the
5 promotional material had any impact on the viewers to
6 show -- to try and have a control in that way. Would
7 that have been a useful activity?

8 MR. FLYNN: Object to form.

9 A. You mean to have doubled the size of the
10 sample and shown two different things to them?

11 Q. (BY MS. HANDMAN) Correct.

12 A. I don't really know. I'd have to think about
13 it. I -- I know that what we did was from the
14 viewpoint of survey research technique, the way it
15 should have been done, so far as I'm concerned, and
16 whether or not there was an -- an alternative that
17 could have contributed something, we would have to
18 talk about it at length.

19 Q. So it's possible that that would have
20 contributed something?

21 MR. FLYNN: Object to form.

22 Q. (BY MS. HANDMAN) Is it possible that that
23 would have contributed?

24 A. I -- I have --

25 MR. FLYNN: Object to form.

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1 who were asked question 9, which is endorses or
2 doesn't endorse, and people who were asked question
3 9A -- or doesn't -- doesn't endorse or does endorse,
4 you know, the -- the rotated question that you said.
5 Did you look at whether there was any statistical
6 significance there?

7 A. No.

8 Q. And were people instructed to ask at equal
9 numbers each type of question?

10 A. Yes.

11 Q. I think if you -- if you look at, for
12 example, Exhibit 336, which is the May 6, Houston
13 questions --

14 MS. HAMILTON: March 6th.

15 Q. (BY MS. HANDMAN) -- March 6th, rather,
16 Houston questionnaire. It's a large packet.

17 If you go to Gelb 747.

18 A. I've got 56, and then it jumps to --

19 Q. 747? Well --

20 A. Oh, wait a -- okay. I've got it.

21 Q. Now, it -- it -- does it look like the
22 male/female question was redacted here?

23 A. If it was, it wasn't deliberate, no.

24 Q. I think they're all like that for Houston.

25 MS. HANDMAN: And so I -- I'm asking

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1 A. -- to answer, I don't know.

2 Q. (BY MS. HANDMAN) As you sit here today, you
3 don't know that it would have contributed; is that
4 correct.

5 MR. FLYNN: Object to form.

6 A. It's like somebody calling me on the phone
7 and describing something in a couple of sentences and
8 saying, what kind of survey do you want to do. I
9 mean, I can't answer that. That's not -- I would have
10 to sit down with you and really go over this in detail
11 and how it would be done and what the advantages and
12 what the output would be. And then if you compared
13 the two statistics, how would you compare them. I
14 mean, I'm not sure what your objective is, so I can't
15 answer on technique.

16 Q. (BY MS. HANDMAN) Did you give any
17 consideration to doing such a control?

18 A. No.

19 Q. Did you consider showing two groups of people
20 two different -- two -- different material?

21 A. No.

22 Q. Did you do any -- you have talked about the
23 statistical study that you did with regard to the
24 Hollywood version compared to everyone else.

25 Did you look at any comparison between people

Page 225

1 you, Mr. Gelb, and you, Mr. Flynn, if they could be
2 produced to be male/female indications for Houston as
3 they are for the other cities?

4 MR. FLYNN: We'll look to see if --

5 THE WITNESS: We'll see if we have it.

6 MR. FLYNN: Yeah. We'll -- we'll take
7 it under advisement.

8 Q. (BY MS. HANDMAN) Mr. Gelb, would it have
9 informed you if a control group had been asked about
10 and shown just the documentary without any commercials
11 or promotions?

12 A. No.

13 Q. Why not?

14 A. Because it does -- it's not true to life.

15 It's not real.

16 Q. But as a control to see what they took away,
17 as you say?

18 A. No. I'm just interested what they took away
19 from the actual program.

20 Q. Well, is use of a control not a common
21 statistical device to ensure that your answers are
22 valid?

23 A. A lot of times, controls are used to measure
24 noise; that is, where people are guessing. But in
25 this type of survey, it's not necessary because people

57 (Pages 222 to 225)

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Gabriel Gelb

June 19, 2003

Page 226		Page 228	
1	are explaining their answers, so I -- I don't see a	1	A. Yes. And remembering that's one -- one
2	need for a control.	2	reason why we asked people if they had Discovery
3	Now, there may be a design, as I said before,	3	Channel in 2001.
4	and you may have it somewhere that it would be useful.	4	MS. HAMILTON: No further questions.
5	But I would have to give it -- give it a lot of	5	THE VIDEOGRAPHER: Off the record at
6	thought as to what it would be useful for, et cetera.	6	4:53.
7	Q. And you said people gave explanations. But	7	(Proceedings concluded at 4:53 p.m.)
8	these are the explanations that, in talking with	8	
9	Ms. Hamilton, you said didn't affect whether they were	9	
10	included in the tabulation on -- in one column or	10	
11	another; is that correct?	11	
12	A. Well, let me explain that a little bit more.	12	
13	In general, I said they don't affect. But if the --	13	
14	the why answer is so counter to the quantitative	14	
15	answer, we would consider taking them out.	15	
16	Q. Was there any instance in this -- in this	16	
17	survey where you took someone out?	17	
18	A. No.	18	
19	MS. HANDMAN: I don't think I have any	19	
20	further questions.	20	
21	EXAMINATION	21	
22	BY MR. FLYNN:	22	
23	Q. Was there any connection between the original	23	
24	viewers who saw the program on November 28th, 2001 and	24	
25	the people who took part in your survey?	25	
Page 227		Page 229	
1	A. Well, the first question we asked after we	1	CHANGES AND SIGNATURE
2	showed the one-hour program was, Had you seen this	2	PAGE LINE CHANGE REASON
3	program before? And 18 percent of the sample said	3	
4	they had.	4	
5	MR. FLYNN: Pass the witness.	5	
6	MS. HANDMAN: I have a follow-up on	6	
7	that, then.	7	
8	FURTHER EXAMINATION	8	
9	BY MS. HANDMAN:	9	
10	Q. Did you ask -- I think you've already said	10	
11	that you don't know whether they saw the program on	11	
12	November 28th, correct, of 2001?	12	
13	A. All I know is -- I have to answer that	13	
14	question and say, that's right.	14	
15	MS. HANDMAN: No further questions.	15	
16	FURTHER EXAMINATION	16	
17	BY MS. HAMILTON:	17	
18	Q. With respect to that, are you -- your	18	
19	question was, had they ever seen the program before?	19	
20	A. Yes.	20	
21	Q. And, I'm sorry, what was your response?	21	
22	A. I said 18 percent of the sample said they	22	
23	had.	23	
24	Q. And the program being the Discovery Channel,	24	
25	Behind Enemy Lines, The Scott O'Grady program?	25	

58 (Pages 226 to 229)

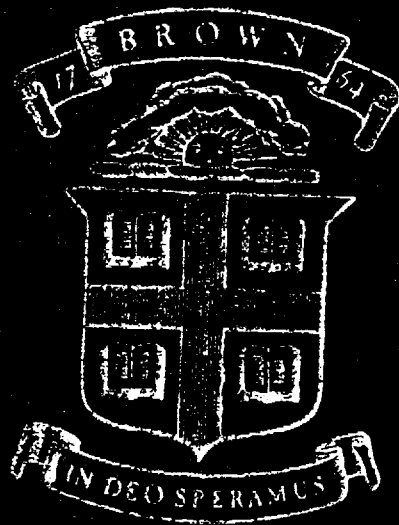


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endodontia

274

enfleurage

end-odon-tia \en-də-'dān-ch(ē)-ə\ *n* [NL, fr. *end-* + *-odontia*]: a branch of dentistry concerned with diseases of the pulp — **end-odon-tic** \en-də-'dān-ik\ *adj* — **end-odon-tist** \en-də-'dān-tist\ *n*
end-odon-tics \en-də-'dān-iks\ *n pl* *but sing in constr*: ENDODONTIA
en-do-en-zy-me \en-(j)də-'en-zim\ *n* [ISV]: an intracellular enzyme

en-do-eryth-ro-cyt-ic \en-(j)də-'l-rith-rə-'sit-ik\ *adj*: occurring in red blood cells — used chiefly of stages of malaria parasites
log-a-mous \en-'dāg-ə-mə\ *adj*: of, relating to, or characterized by endogamy

en-dog-a-my \en-'dāg-ə-mi\ *n*: marriage within a specific group as required by custom or law 2: sexual reproduction between near relatives; esp: pollination of a flower by pollen from another flower of the same plant — compare **AUTOGAMY**

en-do-gen \en-də-'jən\ *n* [F *endogène*, fr. *end-* + *-gène*]: a plant that develops by endogenous growth

en-dog-e-nous \en-'dāg-ə-nəs\ *adj* 1 *a*: growing from or on the inside: developing within the cell wall 2: originating within the body 3: constituting or relating to metabolism of the nitrogenous constituents of cells and tissues — **en-dog-e-nous-ly** *adv*

en-dog-e-ny \en-'dāg-ə-ni\ *n*: growth from within or from a deep layer

en-do-lymph \en-də-'lim(p)l\ *n* [ISV]: the watery fluid in the membranous labyrinth of the ear

en-do-mic-tic \en-də-'mik-tik\ *adj*: of or relating to endomixis

en-do-mix-is \en-'mik-sis\ *n* [NL, fr. *end-* + *Gk mīxis* act of mixing, fr. *mīgnai* to mix — more at **MIX**]: a periodic nuclear reorganization in ciliated protozoans

en-do-morph \en-də-'mɔrf\ *n* [ISV] 1: a crystal of one species enclosed in one of another 2 [*endomer* + *-morph*]: an endomorphic individual

en-do-mor-phic \en-də-'mɔr-fik\ *adj* 1 *a*: of or relating to an endomorph 2: of, relating to, or produced by endomorphism 3 [*endomer* + *-morphic*]: characterized by predominance of the structures (as the internal organs) developed from the endodermal layer of the embryo — **en-do-mor-phic-ly** \en-də-'mɔr-fik-li\ *adv*

en-do-mor-phism \en-də-'mɔr-'fiz-əm\ *n*: a change produced in an intrusive rock by reaction with the wall rock

en-do-par-a-site \en-(j)də-'par-ə-'sit\ *n* [ISV]: a parasite that lives in the internal organs or tissues of its host

en-dop-h-a-gous \en-'dāf-ə-gəs\ *adj*: feeding from within; esp: consuming vegetation or plant debris by burrowing in and disintegrating plant structures

en-do-phyte \en-də-'fit\ *n* [ISV]: a plant living within another plant — **en-do-phyt-ic** \en-də-'fit-ik\ *adj*

en-do-plasm \en-də-'plaz-əm\ *n* [ISV]: the inner relatively fluid part of the cytoplasm — **en-do-plas-mic** \en-də-'plaz-mik\ *adj*

en-dop-o-dite \en-'dɔp-ə-'dit\ *n* [ISV]: the mesial or internal branch of a typical limb of a crustacean — **en-dop-o-dit-ic** \en-'dɔp-ə-'dit-ik\ *adj*

en-do-poly-ploid \en-(j)də-'pāl-i-'ploid\ *adj*: of or relating to a polyploid state in which the chromosomes have divided repeatedly without mitosis or subsequent cell division — **en-do-poly-ploid-ly** \ploid-ly\ *adv*

nerve organ *n*: a structure forming the peripheral terminus of a path of nerve conduction and consisting of an effector or a receptor with associated nerve terminations

endorse \in-'dɔr-sə\ *vt* [alter. of obs. *endoss*, fr. ME *endossen*, fr. MF *endasser*, fr. OF, to put on the back, fr. *en-* + *dos* back, fr. L *dorsum*] 1 *a*: to write on the back of; esp: to sign one's name as payee on the back of (a check) to obtain the cash or credit represented on the face 2: to inscribe (one's signature) on a check, bill, or note 3: to inscribe (as an official document) with a title or memorandum 4: to make over to another (the value represented in a check, bill, or note) by inscribing one's name on the document 5: to acknowledge receipt of (a sum specified) by one's signature on a document 2: to express definite approval of *syn* see **APPROVE**

en-dors-ee \in-'dɔr-'sē, -en\ *n* — **en-dors-er** \in-'dɔr-'sɛr\ *n*

en-dors-ment \in-'dɔr-'smənt\ *n* 1: the act or process of endorsing 2 *a*: something that is written in the process of endorsing *b*: a provision added to an insurance contract altering its scope or application 3: SANCTION, APPROVAL

en-do-scle-rite \en-(j)də-'skli-(ə)-rit\ *n*: a sclerite that is part of the internal skeleton of an insect or other arthropod

en-do-scope \en-də-'skɔp\ *n* [ISV]: an instrument for visualizing the interior of a hollow organ (as the rectum or urethra) — **en-dos-co-py** \en-'dɔs-kə-'pi\ *n*

en-do-scop-ic \en-də-'skɔp-ik\ *adj*: of, relating to, or by means of the endoscope or endoscopy

en-do-skel-e-tal \en-(j)də-'skel-ət-'l\ *adj*: of or relating to an endoskeleton

en-do-skel-e-ton \-ət-'n\ *n*: an internal skeleton or supporting framework in an animal

end-os-mo-sis \en-'dɔs-'mɔ-sis, -dɔz-\ *n* [alter. of obs. *end-osmosis*, fr. F, fr. *end-* + *Gk ōsmos* act of pushing, fr. *ōhein* to push; akin to Skt *vadhai* he strikes]: passage (as of a surface-active substance) through a membrane from a region of lower to a region of higher concentration — **end-os-mot-ic** \en-'dɔs-'mɔt-ik\ *adj* — **end-os-mot-i-cal-ly** \-i-k(ə)-li\ *adv*

en-do-sperm \en-də-'spɜrm\ *n* [F *endosperme*, fr. *end-* + *Gk sperma* seed — more at **SPERM**]: a nutritive tissue in seed plants formed within the embryo sac — **en-do-sper-mic** \en-də-'spɜr-mik\ *adj* — **en-do-sper-mous** \-məs\ *adj*

en-do-spore \en-də-'spɔr\ *n*: a spore (a) *n* [ISV]: an asexual spore developed within the cell esp. in bacteria — **en-do-spore-ic** \en-də-'spɔr-ik, -'spɔr-\ *adj* — **en-do-spore-ous** \-əs; en-'dɔs-'pɔr-'əs\ *adj*

end-os-te-al \en-'dɔs-'tē-əl\ *adj* 1: of or relating to the endosteum 2: located within bone or cartilage — **end-os-te-al-ly** \-ə-'li\ *adv*

en-do-ster-nite \en-də-'stɛr-nit\ *n* [ISV]: a segment of the endoskeleton of an arthropod

end-os-te-um \en-'dɔs-'tē-əm\ *n pl* **end-os-tea** \-tē-ə\ [NL, fr. *end-* + *Gk ostron* bone — more at **OSTEOUS**]: the layer of vascular connective tissue lining the medullary cavities of bone

en-tra-cum \en-'dɔs-tri-kəm\ *n pl* **en-tra-cum** \-kə\ [NL, *end-* + *Gk ostrakon* shell]: the inner layer of a shell (as of a crustacean)

en-do-the-ci-um \en-də-'thē-si-(ə)-əm\ *n pl* **en-do-the-cia** \-s(ə)-ē-ə\ [NL]: the inner lining of a mature anther

endothel- or **endothello-** *comb form* [ISV, fr. NL *endothelium*]: endothelium (<*endothelloma*)

en-do-the-li-al \en-də-'thē-lē-əl\ *adj*: of, relating to, or produced from endothelium

en-do-the-li-um \-lē-əm\ *n pl* **en-do-the-lia** \-lē-ə\ [NL, fr. *end-* + *epithelium*] 1: an epithelium of mesoblastic origin composed of a single layer of thin flattened cells that lines internal body cavities 2: the inner layer of the seed coat of some plants — **en-do-the-lioid** \-thē-'lɔid\ *adj*

en-do-therm \en-də-'θɜrm\ *n*: a warm-blooded animal

en-do-ther-mic \en-də-'θɜr-mik\ or **en-do-ther-mal** \-məl\ *adj* [ISV]: characterized by or formed with absorption of heat

en-do-tox-in \en-də-'tɔk-sən\ *n* [ISV]: a toxin of internal origin; specif: a poisonous substance present in bacteria (as of typhoid fever) but separable from the cell body only on its disintegration

en-do-tra-che-al \en-(j)də-'trā-kē-əl\ *adj* 1: placed within the trachea (an ~ tube) 2: applied or effected through the trachea

en-dow \in-'daʊ\ *vi* [ME *endowen*, fr. AF *endouer*, fr. MF *en-* + *douer* to endow, fr. L *dotare*, fr. *dot-*, *dos* gift, dowry] 1: to furnish with a dowry 2: to furnish with an income 3 *a*: to provide or equip gratuitously: **ENRICH** *b*: **CREDIT** *5a*, **INVEST** *5*

en-dow-ment \-mənt\ *n* 1: the act or process of endowing 2: something that is endowed; specif: the portion of an institution's income derived from donations 3: natural capacity, power, or ability

en-do-zo-ic \en-də-'zɔ-ik\ *adj* [ISV]: living within or involving passage through an animal (~ distribution of weeds)

en-dō-pa-per \en-(d)-'pā-pər\ *n*: a once-folded sheet of paper having one leaf pasted flat against the inside of the front or back cover of a book and the other pasted at the base to the first or last page

end plate *n*: a flat plate or structure at the end of something; specif: a complex terminal arborization of a motor nerve fiber

end run *n* 1: a football play in which the ball carrier attempts to run wide around his own end 2: an evasive trick

end-stopped \en-(d)-'stɔpt\ *adj*, *of a verse*: marked by a logical or rhetorical pause at the end — compare **RUN-ON**

end table *n*: a small table used beside a larger piece of furniture

en-due \in-'dʊ-(y)u\ *vi* [ME *enduen*, fr. MF *enduire* to bring in, introduce, fr. L *inducere* — more at **INDUCE**] 1 *a*: PROVIDE, **ENDOW** *b*: IMBUE, TRANSFUSE 2 [ME *induen*, fr. L *inducere*, fr. *ind-* + *ducere* to put on] to put on; *DOM*

en-dur-able \in-'dʊr-(y)u-r-ə-bəl\ *adj*: capable of being endured — **en-dur-ably** \-b(ə)-li\ *adv*

en-dur-ance \in-'dʊr-(y)u-r-ən(t)s\ *n* 1: PERMANENCE, DURATION 2: the ability to withstand hardship, adversity, or stress 3: SUPPERSISTENCE, TRIAL

en-dure \in-'dʊr-(y)u-r-ən(t)s\ *vb* [ME *enduren*, fr. MF *endurer*, fr. (assumed) VL *indurare*, fr. L, to harden, fr. *in-* + *durare* to harden, endure — more at **DURINO**] *vi* 1: to continue in the same state; LAST 2: to remain firm under suffering or misfortune without yielding ~ *vi* 1: to undergo (as a hardship) esp. without giving in; SUFFER 2: TOLERATE, PERMIT *syn* see **BEAR**, **CONTINUE**

en-dur-ing *adj*: LASTING, DURABLE — **en-dur-ing-ly** \-li\ *adv* — **en-dur-ing-ness** *n*

end-ways \en-'dwɛz\ or **end-wise** \-dwɛz\ *adv* (or *adj*) 1: with the end forward 2: **UPWARDS** 3: at or on the end

En-dym-i-on \en-'dɪm-i-ən\ *n* [L, fr. Gk *Endymion*]: a beautiful youth loved by Selene

-ene \en\ *n suffix* [ISV, fr. Gk *-ēnē*, fem. of *-ēnos*, adj. suffix]: unsaturated carbon compound (benzene); esp: carbon compound with one double bond (ethylene)

en-e-ma \en-'mə\ *n* [LL, fr. Gk, fr. *enēma* to inject, fr. *en-* + *hēma* to send] 1: the injection of liquid into the intestine by way of the anus 2: material for injection as an enema

en-e-my \en-'ə-mi\ *n*, *friend* [ME *enemi*, fr. OF, fr. L *inimicus*, fr. *in-* + *amicus* (friend)] 1: one that seeks the injury, overthrow, or failure of an opponent 2: something harmful or deadly 3 *a*: a military adversary *b*: a hostile unit or force

syn **ENEMY**, **POW** mean one who shows hostility or ill will. **ENEMY** stresses antagonism showing itself in hatred or destructive attitude or action; **POW** stresses active fighting or struggle but is used only figuratively of an enemy in war

en-er-get-ic \en-er-'jet-ik\ *adj* [Gk *energētikos*, fr. *energein* to be active, fr. *energōs*] 1: marked by energy: **STRENUOUS** 2: operating with vigor or effect 3: of or relating to energy (~ equation) *syn* see **VIGOROUS** — **en-er-get-i-cal-ly** \-i-k(ə)-li\ *adv*

en-er-get-ics \en-er-'jet-iks\ *n pl* *but sing in constr*: a branch of mechanics that deals primarily with energy and its transformations

en-er-gid \en-er-'jɪd, -'jɪd\ *n* [ISV, fr. Gk *energōs*]: a nucleus and the body of cytoplasm with which it interacts

en-er-gize \en-er-'jɪz\ *vi*: to put forth energy; **ACT** ~ *vi* 1: to impart energy to 2: to make energetic or vigorous 3: to apply voltage to — **en-er-giz-er** *n*

en-er-gy \en-er-'jɪ\ *n* [LL *energia*, fr. Gk *energeia* activity, fr. *energōs* active, fr. *en* in + *ergon* work] 1: vitality of expression 2: the capacity of acting 3: power forcefully exerted 4: the capacity for doing work *syn* see **POWER**

energy level *n*: one of the stable states of constant energy that may be assumed by a physical system — called also **energy state**

en-er-vate \en-'nɛr-vət\ *adj*: **ENERVATED**

en-er-vate \en-'nɛr-vāt\ *vi* [L *enervatus*, pp. of *enervare*, fr. *e-* + *nervus* sinew] 1: to lessen the vitality or strength of 2: to reduce the mental or moral vigor of *syn* see **UNNERVE** — **en-er-vation** \en-er-'vā-shən\ *n*

en-fan-ter-ri-ble \en-'fā-'tɛr-ri-'bl\ *n* [F]: one whose inopportune remarks or unconventional actions cause embarrassment

en-fee-ble \in-'fē-bəl\ *vi* **en-fee-ble** \-b(ə)-li\ [ME *enfeblen*, fr. MF *enfeblir*, fr. OF, fr. *en-* + *feble* feeble] to make feeble *syn* see **WEAKEN** — **en-fee-ble-ment** \-b(ə)-mənt\ *n*

en-feoff \in-'fēf, -'fēf\ *vi* [ME *enfeoffen*, fr. AF *enfeoffer*, fr. OF *en-* + *feff*]: to invest with a fief, fee, or other possession — **en-feoff-ment** \-mənt\ *n*

en-fet-ter \in-'fɛt-ər\ *vt*: to bind in fetters: **ENCHAIN**

en-fi-lade \en-'fə-'lād, -'lād\ *n* [F, fr. *enfiler* to thread, enfilade, fr. OF, to thread, fr. *en-* + *fil* thread]: a condition permitting the delivery of gunfire in a lengthwise direction at an objective

enfilade *vt*: to rake or be in a position to rake with gunfire in a lengthwise direction

enflame *var* of **INFLAME**

en-fleu-rage \en-'flɛr-'lɛz\ *n* [F]: a process of extracting per-

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SYLLABICATION: en·dorse

PRONUNCIATION: AUDIO: ɛn·dɔrs' KEY

VARIANT FORMS: also in·dorse (In-)

TRANSITIVE Inflected forms: en·dorsed, en·dorsing, VERB: en·dorses

1. To write one's signature on the back of (a check, for example) as evidence of the legal transfer of its ownership, especially in return for the cash or credit indicated on its face.
2. To place (one's signature), as on a contract, to indicate approval of its contents or terms.
3. To acknowledge (receipt of payment) by signing a bill, draft, or other instrument.
4. To give approval of or support to, especially by

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public statement; sanction: *endorse a political candidate*. See synonyms at **approve**.

ETYMOLOGY: Middle English *endosen*, from Anglo-Norman *endosser*, from Medieval Latin *indorsare*: Latin *in-*, upon, in; see *en-* + Latin *dorsum*, back.

OTHER FORMS: **en-dors'a-ble** —ADJECTIVE


en-dors'er, en-dor'sor —NOUN

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06/18/2003

Bosnia Questionnaire
Gelb Consulting Group, Inc.
March 24, 2003

Location: Houston 1032

Interviewer: Re-screen participants on arrival to the research center.

- A. Have you participated in a focus group discussion or research project with any research firm within the past 6 months?

☐ Yes *Thank and terminate*
☒ No
☐ Don't know/ Don't remember *Thank and terminate*

- B. Do you, or does anyone in your household work for a marketing research firm, advertising agency, video store, or in the entertainment industry?

☐ Yes *Thank and terminate*
☒ No
☐ Don't know/ Don't remember *Thank and terminate*

- C. Did you have the Discovery Channel available in your home in 2001?

Yes 1 Ask Screener D
No 2 Not qualified - *Thank and terminate*

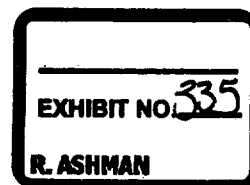
- D. Have you seen one or more Discovery Channel program(s) in the past 3 months?

Yes 1 Qualified - Continue with Q.1
No 2 Not qualified - *Thank and terminate*

Thank you for taking time to participate in this study. It will take about 90 minutes and you will receive \$40 after completing the interview for your time and travel expenses. Please come with me to the interview room.

I'd like to show you a one-hour program that was shown on the Discovery Channel. After you have seen it, I'd like to ask you a few questions. For any of the questions, it's OK to say if you don't know.

{Start the videotape}



GELB 823

Bosnia Questionnaire
Gelb Consulting Group, Inc.
March 24, 2003

Location: Houston

9. After seeing the program, do you think that the actual pilot endorses or doesn't endorse the movie that was advertised on the program you just saw? (*Rotate asking Q.9 and Q.9a*)

The actual pilot endorses the movie.....1 Ask Q.10 and 11
The actual pilot does not endorse the movie.....2 Skip to Q.12
I don't know.....3 Skip to Q.14

- 9a. After seeing the program, do you think that the actual pilot doesn't endorse or does endorse the movie that was advertised on the program you just saw?

The actual pilot endorses the movie.....1 Ask Q.10 and 11
The actual pilot does not endorse the movie.....2 Skip to Q.12
I don't know.....3 Skip to Q.14

10. Why do you say that the pilot endorses the movie?

because I don't think the movie portrayed him in a bad light. ?

The movie portrayed him as a hero, for surviving behind enemy lines.

11. When you say the pilot endorses the movie, what do you mean by "endorses"?

I think he agrees with the story line, because it, had some kind of truth to it, it was similar to his truth. 5

12. Why do you say that the pilot does not endorse the movie?

13. When you say the pilot does not endorse the movie, what do you mean by "endorse"?

Bosnia Questionnaire
Gelb Consulting Group, Inc.
March 24, 2003

Location: Houston

9. After seeing the program, do you think that the actual pilot endorses or doesn't endorse the movie that was advertised on the program you just saw? (*Rotate asking Q.9 and Q.9a*)

The actual pilot endorses the movie.....1 Ask Q.10 and 11
The actual pilot does not endorse the movie2 Skip to Q.12
I don't know3 Skip to Q.14

- 9a. After seeing the program, do you think that the actual pilot doesn't endorse or does endorse the movie that was advertised on the program you just saw?

The actual pilot endorses the movie.....1 Ask Q.10 and 11
The actual pilot does not endorse the movie2 Skip to Q.12
I don't know3 Skip to Q.14

10. Why do you say that the pilot endorses the movie?

because he was a part of the
documentary.

3

11. When you say the pilot endorses the movie, what do you mean by "endorses"?

he didn't have a problem
with the making of the movie,
he supports the movie.

3

12. Why do you say that the pilot does not endorse the movie?

13. When you say the pilot does not endorse the movie, what do you mean by "endorse"?

GELB 871

Bosnia Questionnaire
Gelb Consulting Group, Inc.
March 24, 2003

Location: Houston

9. After seeing the program, do you think that the actual pilot endorses or doesn't endorse the movie that was advertised on the program you just saw? (*Rotate asking Q.9 and Q.9a*)

The actual pilot endorses the movie.....1 Ask Q.10 and 11
The actual pilot does not endorse the movie.....2 Skip to Q.12
I don't know.....3 Skip to Q.14

- 9a. After seeing the program, do you think that the actual pilot doesn't endorse or does endorse the movie that was advertised on the program you just saw?

The actual pilot endorses the movie.....① Ask Q.10 and 11
The actual pilot does not endorse the movie.....2 Skip to Q.12
I don't know.....3 Skip to Q.14

10. Why do you say that the pilot endorses the movie?

It seemed that it ran along the general
true story line. 2

11. When you say the pilot endorses the movie, what do you mean by "endorses"?

He told the story to the discovery
channel so that the movie would be
close to the truth. 1

12. Why do you say that the pilot does not endorse the movie?

13. When you say the pilot does not endorse the movie, what do you mean by "endorse"?

GELB 960

Bosnia Questionnaire
Gelb Consulting Group, Inc.
March 6, 2002 - Draft

1001
Houston

Interviewer: Re-screen participants on arrival to the research center.

- A. Have you participated in a focus group discussion or research project with any research firm within the past 6 months?

☐ Yes *Thank and terminate*
☒ No
☐ Don't know/ Don't remember *Thank and terminate*

- B. Do you, or does anyone in your household work for a marketing research firm, advertising agency, video store, or in the entertainment industry?

☐ Yes *Thank and terminate*
☒ No
☐ Don't know/ Don't remember *Thank and terminate*

- C. Did you have the Discovery Channel available in your home in 2001?

Yes 1 Ask Screener D
No 2 Not qualified - *Thank and terminate*

- D. Have you seen one or more Discovery Channel program(s) in the past 3 months?

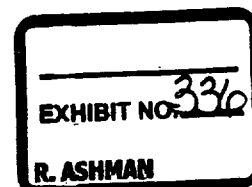
Yes 1 Qualified - Continue with Q.1
No 2 Not qualified - *Thank and terminate*

Thank you for taking time to participate in this study. It will take about 90 minutes and you will receive \$40 after completing the interview for your time and travel expenses. Please come with me to the interview room.

I'd like to show you a one-hour program that was shown on the Discovery Channel. After you have seen it, I'd like to ask you a few questions. For any of the questions, it's OK to say if you don't know.

{Start the videotape}

GELB 718



Bosnia Questionnaire
Gelb Consulting Group, Inc.
March 6, 2002 - Draft

7. After seeing this program, do you think that the movie that was advertised is or is not the actual pilot's real-life story? (*Rotate asking Q.7 and Q.7a*)

Yes, it is	1	Ask Q.8
No, it is not.....	②	Ask Q.8
Don't know	3	Skip to Q.9

- 7a. After seeing this program, do you think that the movie that was advertised is not the actual pilot's real-life story or is the pilot's real-life story?

Yes, it is	1	Ask Q.8
No, it is not.....	2	Ask Q.8
Don't know	3	Skip to Q.9

If Respondent answered "Yes" or "No" in Q.7 ask Q.8

8. Why do you say that?

It's historical-fiction. There are differences such as the fiction has two characters that were shot down, and the real event had only O'Grady.

Bosnia Questionnaire
Gelb Consulting Group, Inc.
March 6, 2002 - Draft

7. After seeing this program, do you think that the movie that was advertised is or is not the actual pilot's real-life story? (*Rotate asking Q.7 and Q.7a*)

Yes, it is	1	Ask Q.8
No, it is not.....	2	Ask Q.8
Don't know	3	Skip to Q.9

7a. After seeing this program, do you think that the movie that was advertised is not the actual pilot's real-life story or is the pilot's real-life story?

Yes, it is	1	Ask Q.8
No, it is not.....	2	Ask Q.8
Don't know	3	Skip to Q.9

If Respondent answered "Yes" or "No" in Q.7 ask Q.8

8. Why do you say that?

In the movie he does things like traveling a long way through a town. It didn't say that he did any of this in the program. Some of the events in the movie I don't think go along with what I saw actually happened to him in the program. 2

Bosnia Questionnaire
Gelb Consulting Group, Inc.
March 6, 2002 - Draft

1003
Houston

Interviewer: Re-screen participants on arrival to the research center.

- A. Have you participated in a focus group discussion or research project with any research firm within the past 6 months?

☐ Yes *Thank and terminate*
☒ No
☐ Don't know/ Don't remember *Thank and terminate*

- B. Do you, or does anyone in your household work for a marketing research firm, advertising agency, video store, or in the entertainment industry?

☐ Yes *Thank and terminate*
☒ No
☐ Don't know/ Don't remember *Thank and terminate*

- C. Did you have the Discovery Channel available in your home in 2001?

Yes 1 Ask Screener D
No 2 Not qualified - *Thank and terminate*

- D. Have you seen one or more Discovery Channel program(s) in the past 3 months?

Yes 1 Qualified - Continue with Q.1
No 2 Not qualified - *Thank and terminate*

Thank you for taking time to participate in this study. It will take about 90 minutes and you will receive \$40 after completing the interview for your time and travel expenses. Please come with me to the interview room.

I'd like to show you a one-hour program that was shown on the Discovery Channel. After you have seen it, I'd like to ask you a few questions. For any of the questions, it's OK to say if you don't know.

{Start the videotape}

Bosnia Questionnaire
Gelb Consulting Group, Inc.
March 6, 2002 - Draft

7. After seeing this program, do you think that the movie that was advertised is or is not the actual pilot's real-life story? (Rotate asking Q.7 and Q.7a)

Yes, it is	1	Ask Q.8
No, it is not.....	2	Ask Q.8
Don't know	3	Skip to Q.9

7a. After seeing this program, do you think that the movie that was advertised is not the actual pilot's real-life story or is the pilot's real-life story?

Yes, it is	1	Ask Q.8
No, it is not.....	2	Ask Q.8
Don't know	3	Skip to Q.9

If Respondent answered "Yes" or "No" in Q.7 ask Q.8

8. Why do you say that?

The movie had alot more then what we saw in the program (P) In the movie (even in the coda) there were other people involved and more drama in the movie. In the program he was just walking around by himself until they found him. Parts in the movie like when the wife and father got a phone call about him, no one was actually there filming them, so I thought it was a re-enactment (TA)

Hastings, Scott

From: Flynn, C. W.
Sent: Friday, June 06, 2003 10:25 AM
To: Hastings, Scott
Subject: FW: Bosnia Pre-test tab



Bosnia Pre-test
tab_3-19-03.do...

C. W. "Peter" Flynn
Locke Liddell & Sapp LLP
2200 Ross Avenue
Suite 2200
Dallas, Texas 75201
Tel: (214) 740-8654
Fax: (214) 740-8800
Email: cwflynn@lockeliddell.com <mailto:cwflynn@lockeliddell.com>

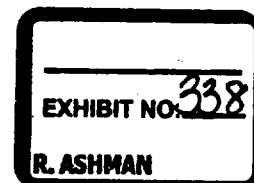
-----Original Message-----

From: Gabe Gelb [mailto:ggelb@gelbconsulting.com]
Sent: Thursday, March 20, 2003 11:08 AM
To: 'cwflynn@lockeliddell.com'; 'gebowles@lockeliddell.com';
'rwhardin@lockeliddell.com'
Subject: FW: Bosnia Pre-test tab

Let's discuss.

Gabriel M. Gelb
Gelb Consulting Group Inc.
10260 Westheimer, Suite 240
Houston, TX. 77042
Phone: 713-526-5711 Ext 14
Fax: 713-526-4842
<ggelb@gelbconsulting.com>
<http://www.gelbconsulting.com/>

> <<Bosnia Pre-test tab_3-19-03.doc>>



SOG 005460

Bosnia Pre-test Tabulation
March 19, 2003

Total respondents	19
1. Had you seen this program before or not?	
Yes	0
No	19
2. In your opinion, after seeing this program, did the program tell about an event that actually took place or not?	
I believe the program told about an actual event	19
I do not believe the program told about an actual event	0
I'm not sure the program is about an actual event	0
3. So far as you can recall, did the actual pilot who was shot down in enemy territory appear in any part of this one-hour program?	
Yes	16
No	3
Don't know	0
4. Do you recall the pilot's name?	
Yes	18
Scott O'Grady	12
Scott	2
Scott Grady	1
Kevin O'Brady	1
O'Brady	1
Scott O	1
No	1
5. Do you recall whether or not a movie was advertised on this program?	
Yes	19
No	0
6. If Yes: What was the name of the movie that was advertised?	
Behind Enemy Lines	19

Bosnia Pre-test Tabulation
March 19, 2003

7. After seeing this program, do you think that the movie that was advertised is or is not the actual pilot's real-life story? 8. Why do you say that?

Yes, it is

6

There are a lot of similar events. Like the pilot being shot down behind enemy lines and him being rescued.

It was showing a lot of parts of what was happening. They were bringing him back from some other part of the country and what ever it took for them to do it.

They showed the way he was out there, and also towards the ending they were showing him and the president walking together.

Because what they said at the beginning described what type of person he was.

It was telling about the pilot and it seemed like it was telling the truth.

There were many context clues in the program that made me believe that it was about the pilot. They showed the commercial for the movie Behind Enemy Lines many times in the program. In the commercial for the movie it said it was based on a true story. I don't think it said specifically who the movie was based on. I just assumed it was about the pilot.

No, it is not

13

I think that some of the events that happened in the movie didn't really happen in actuality.

It's historical fiction. There are differences, such as the fiction has two characters that were shot down and the real event had only O'Grady.

In the movie he does things like traveling a long way through a town. It didn't say that he did any of this in the program. Some of the events in the movie I don't think go along with what I saw actually happened to him in the program.

The movie had a lot more than what we saw in the program. In the movie (even in the ad) there were other people involved and more drama in the movie. In the program he was just walking around by himself until they found him. Parts in the movie, like when the wife and father got a phone call about him, no one was actually there filming them, so I thought it as a re-re-enactment.

There were more diverse scenes than what the pilot described as what actually happened.

The actual event was in Bosnia and the movie took place in Serbia.

Bosnia Pre-test Tabulation
March 19, 2003

I think it may have elements of his life but not his life story. I think some of it may have been fictionalized.

The real person, Scott, looked different. The person we saw in the documentary was not Scott, it was an actor, playing Scott.

I think that the movie was similar to his life but not exactly. There were just a lot of things that were different in the movie than what actually happened in real life.

I didn't see enough of the movie, or advertisement, nor did I see anyone portray him. The name of the pilot in the movie was different. There were scenes in the preview of the movie that were not in the documentary part.

Th movie is overdone. They blow up stuff and make it for Hollywood. It is over dramatized.

In real life the actual pilot did what he had to do to survive. In the movie his role is highly glamorized.

From what the commercial was showing. More events happened to the person in the movie that what was actually shown in the documentary.

Don't know

0

9. After seeing the program, do you think that the actual pilot endorses or doesn't endorse the movie that was advertised on the program you just saw?

The actual pilot endorses the movie	13
The actual pilot does not endorse the movie	3
I don't know	3

10. Why do you say that the pilot endorses the movie?

Because it is about himself. (2)

He looks like he was there during some of the filming of Behind Enemy Lines.

It's his life story. He wants everyone to know what he went through and why he's so important.

It was his story. It was his own life story, why wouldn't he want to endorse it?

It involves some of the similar circumstances of the actual events. I believe the pilot understands that even though some events in the movie are facts, he realizes that a movie is fiction, therefore, I think he endorses the movie.

Bosnia Pre-test Tabulation
March 19, 2003

If he did not endorse the movie then he would not have the documentary.

He participates in this show and it was promoting the movie.

He wanted you to go see the movie because it was a true story, the situation was true.

The movie portrays a real life experience of what happens in the Air Force.

It was more of a self documentation and autobiography of the event. He actually talked about the events that happened to him.

He was talking in the program.

There is nothing on the tape to suggest that he doesn't. It's assumed that he is supportive of the movie rather than not, because the documentary and advertisement is being shown at the same time.

11. When you say the pilot endorses the movie, what do you mean by "endorses"?

It parallels his incident that he survived in Bosnia. He told his story so it could be retold.

That he is for the movie.

He gives his permission to have the movie made and tell his story.

He knows about the movie.

He contributes to the story, he gave them funding to be able to film and tell his story.

He thinks it's OK that they are making a movie that relates to his story.

The pilot's story seems to go with what the movie is about and he backs up most of the events that happened in the documentary part of this tape.

Probably he would back it up and supply some of the facts.

He kept talking about the next episodes, he lets you know if he is going to get killed or if he was going to survive.

It's close to what actually happened in his real life.

Bosnia Pre-test Tabulation
March 19, 2003

He actually told the story himself.

Showing what's really behind enemy lines.

Although he states that this movie isn't a real life account, he endorses this film because it presents his occupation and the U.S. military in a positive way.

12. Why do you say that the pilot does not endorse the movie?

He didn't come out and say go watch the movie. If he was endorsing the movie, I would think that in the program he would say something about recommending it.

The pilot said that the characters in the movie were not portrayed realistically and that the movie overall was glamorized. He stated that in the movie Top Gun the pilots are not the way they are in real life. I am inferring from this statement that he probably would not endorse this movie.

I think the event was very emotional for him because he was crying when he was talking about it, so I don't think he would want a movie made about an event in his life that was so tragic.

13. When you say the pilot does not endorse the movie, what do you mean by "endorse"?

He recommends people go and see the movie.

The pilot approved of the movie, and through his approval he would in effect be standing behind and endorsing the movie.

He sponsors the movie and that he gets a check cut from the movie. Also, that he is all for the movie being made.

14. Finally, did you see the movie that was advertised on this program? (either in a theatre or on video or DVD). Do you recall the name of the movie?

Yes	7
Behind Enemy Lines	7

No	12
----	----

15. Are you aware of any dispute or litigation between Captain O'Grady and 20th Century Fox movie studio?

Yes	0
No	19

Bosnia Questionnaire
Gelb Consulting Group, Inc.
March 24, 2003

Location: Houston

Recruiting screener: Adult men and women between the ages of 18 and 65 will be randomly recruited by telephone to come to a research facility for the interview.

Hello, my name is _____ with Gelb Consulting Group, an independent research firm in Houston. We are conducting a research study with Houston residents about cable television and the Discovery Channel.

- A. Do you have cable television in your home? Yes No
B. Does it include the Discovery Channel? Yes No

If No in A and B, Discontinue

I am calling today to invite you to participate in one of the interview sessions. During the interview you will be shown an action adventure video followed by a short interview. It will take about 90 minutes and you will receive \$40 after completing the interview for your time and travel expenses. Your name will not be used in any way and there are no sales involved with the research. Would you be interested in participating and sharing your ideas with us?

Yes ☐ Continue No ☐ Thank and terminate

- A. Have you participated in a focus group discussion or research project with any research firm within the past 6 months?

☐ Yes **Thank and terminate**
☐ No
☐ Don't know/ Don't remember **Thank and terminate**

- B. Do you, or does anyone in your household work for a marketing research firm, advertising agency, video store, or in the entertainment industry?

☐ Yes **Thank and terminate**
☐ No
☐ Don't know/ Don't remember **Thank and terminate**

- C. Did you have the Discovery Channel available in your home in 2001?

Yes1 Ask Screener D
No2 Not qualified - **Thank and terminate**

- D. Have you seen one or more Discovery Channel program(s) in the past 3 months?

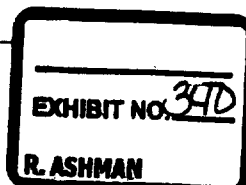
Yes1 Qualified
No2 Not qualified - **Thank and terminate**

Great. The viewing and interview will be at (insert location). Please give me your name and address so I can send you a confirmation and direction to (insert location).

Name _____ Phone _____

Address _____

GELB 066



Bosnia Questionnaire
Gelb Consulting Group, Inc.
March 24, 2003

Location: Houston

Interviewer: Re-screen participants on arrival to the research center.

A. Have you participated in a focus group discussion or research project with any research firm within the past 6 months?

- ☐ Yes *Thank and terminate*
- ☐ No
- ☐ Don't know/ Don't remember *Thank and terminate*

B. Do you, or does anyone in your household work for a marketing research firm, advertising agency, video store, or in the entertainment industry?

- ☐ Yes *Thank and terminate*
- ☐ No
- ☐ Don't know/ Don't remember *Thank and terminate*

C. Did you have the Discovery Channel available in your home in 2001?

- Yes1 Ask Screener D
- No2 Not qualified - *Thank and terminate*

D. Have you seen one or more Discovery Channel program(s) in the past 3 months?

- Yes1 Qualified – Continue with Q.1
- No2 Not qualified - Thank and terminate

Thank you for taking time to participate in this study. It will take about 90 minutes and you will receive \$40 after completing the interview for your time and travel expenses. Please come with me to the interview room.

I'd like to show you a one-hour program that was shown on the Discovery Channel. After you have seen it, I'd like to ask you a few questions. For any of the questions, it's OK to say if you don't know.

{Start the videotape}

Bosnia Questionnaire
Gelb Consulting Group, Inc.
March 24, 2003

Location: Houston

Ask the following questions after Respondent has viewed the Discovery Channel program.

Now I have several questions to ask about the program you just saw.

1. Had you seen this program before or not?

Yes1 Continue
No2 Continue
Don't remember3 Continue

2. In your opinion, after seeing this program, did the program tell about an event that actually took place or not?

I believe the program told about an actual event1 Continue
I do not believe the program told about an actual event2 Skip to Q14
I'm not sure the program is about an actual event3 Skip to Q.14

3. So far as you can recall, did the actual pilot who was shot down in enemy territory appear in any part of this one-hour program?

Yes1 Continue
No2 Continue
Don't remember3 Continue

4. Do you recall the pilot's name?

Yes1 → What was the pilot's name? _____
No2

5. Do you recall whether or not a movie was advertised on this program?

Yes1 Ask Q.6.
No2 Skip to Q.7
Don't remember3 Skip to Q.7

6. If Yes: What was the name of the movie that was advertised?

GELB 068

Bosnia Questionnaire
Gelb Consulting Group, Inc.
March 24, 2003

Location: Houston

7. After seeing this program, do you think that the movie that was advertised is or is not a Hollywood version of the actual pilot's real-life story? (*Rotate asking Q.7 and Q.7a*)

Yes, it is	1	Ask Q.8
No, it is not.....	2	Ask Q.8
Don't know	3	Skip to Q.9

7a. After seeing this program, do you think that the movie that was advertised is not or is a Hollywood version of the actual pilot's real-life story?

Yes, it is	1	Ask Q.8
No, it is not.....	2	Ask Q.8
Don't know	3	Skip to Q.9

If Respondent answered "Yes" or "No" in Q.7 ask Q.8

8. Why do you say that?

Bosnia Questionnaire
Gelb Consulting Group, Inc.
March 24, 2003

Location: Houston

9. After seeing the program, do you think that the actual pilot endorses or doesn't endorse the movie that was advertised on the program you just saw? (*Rotate asking Q.9 and Q.9a*)

The actual pilot endorses the movie.....	1	Ask Q.10 and 11
The actual pilot does not endorse the movie	2	Skip to Q.12
I don't know.....	3	Skip to Q.14

- 9a. After seeing the program, do you think that the actual pilot doesn't endorse or does endorse the movie that was advertised on the program you just saw?

The actual pilot endorses the movie.....	1	Ask Q.10 and 11
The actual pilot does not endorse the movie	2	Skip to Q.12
I don't know.....	3	Skip to Q.14

10. Why do you say that the pilot endorses the movie?

11. When you say the pilot endorses the movie, what do you mean by "endorses"?

12. Why do you say that the pilot does not endorse the movie?

13. When you say the pilot does not endorse the movie, what do you mean by "endorse"?

GELB 070

Bosnia Questionnaire
Gelb Consulting Group, Inc.
March 24, 2003

Location: Houston

14. Finally, did you see the movie that was advertised on this program? (either in a theatre or on video or DVD) Do you recall the name of the movie?

Yes1 → What was name of the movie? _____
No2

15. Are you aware of any dispute or litigation between Captain O'Grady and 20th Century Fox movie studio?

Yes1
No2

CLOSING:

Thank you for taking time to participate in this study. In case my supervisor wants to check on my work, may I please have your name and phone number? You may be called to verify that I conducted this survey but you will not be contacted for any other reason.

Name: Mr/ Ms _____ Phone (____) _____

Address: _____ Houston, TX _____

Interviewer: _____ Date: _____

Please sign the receipt below to verify that you have received your check for participating.

Bosnia Questionnaire
Gelb Consulting Group, Inc.
March 24, 2003

Location: Baltimore – Consumer Pulse of Baltimore

3001

Interviewer: Re-screen participants on arrival to the research center.

- A. Have you participated in a focus group discussion or research project with any research firm within the past 6 months?

☐ Yes

Thank and terminate

☒ No

☐ Don't know/ Don't remember

Thank and terminate

- B. Do you, or does anyone in your household work for a marketing research firm, advertising agency, video store, or in the entertainment industry?

☐ Yes

Thank and terminate

☒ No

☐ Don't know/ Don't remember

Thank and terminate

- C. Did you have the Discovery Channel available in your home in 2001?

Yes ☒ Ask Screener D

No 2 Not qualified - *Thank and terminate*

- D. Have you seen one or more Discovery Channel program(s) in the past 3 months?

Yes ☒ Qualified – Continue with Q.1

No 2 Not qualified - *Thank and terminate*

Thank you for taking time to participate in this study. It will take about 90 minutes and you will receive \$40 after completing the interview for your time and travel expenses. Please come with me to the interview room.

I'd like to show you a one-hour program that was shown on the Discovery Channel. After you have seen it, I'd like to ask you a few questions. For any of the questions, it's OK to say if you don't know.

{Start the videotape}



GELB 195

Bosnia Questionnaire
Gelb Consulting Group, Inc.
March 24, 2003

Location: Baltimore – Consumer Pulse of Baltimore

9. After seeing the program, do you think that the actual pilot endorses or doesn't endorse the movie that was advertised on the program you just saw? (*Rotate asking Q.9 and Q.9a*)

The actual pilot endorses the movie..... 1 Ask Q.10 and 11
The actual pilot does not endorse the movie..... 2 Skip to Q.12
I don't know..... 3 Skip to Q.14

- 9a. After seeing the program, do you think that the actual pilot doesn't endorse or does endorse the movie that was advertised on the program you just saw?

The actual pilot endorses the movie..... ① Ask Q.10 and 11
The actual pilot does not endorse the movie..... 2 Skip to Q.12
I don't know..... 3 Skip to Q.14

10. Why do you say that the pilot endorses the movie?

② It's about him so it seems he did, or should do so.

11. When you say the pilot endorses the movie, what do you mean by "endorses"?

⑩ Promotes the movie

12. Why do you say that the pilot does not endorse the movie?

13. When you say the pilot does not endorse the movie, what do you mean by "endorse"?

Bosnia Questionnaire
Gelb Consulting Group, Inc.
March 24, 2003

Location: Baltimore – Consumer Pulse of Baltimore

9. After seeing the program, do you think that the actual pilot endorses or doesn't endorse the movie that was advertised on the program you just saw? (Rotate asking Q.9 and Q.9a)

The actual pilot endorses the movie.....1 Ask Q.10 and 11
The actual pilot does not endorse the movie.....2 Skip to Q.12
I don't know.....3 Skip to Q.14

- ✕ 9a. After seeing the program, do you think that the actual pilot doesn't endorse or does endorse the movie that was advertised on the program you just saw?

The actual pilot endorses the movie.....1 Ask Q.10 and 11
The actual pilot does not endorse the movie.....2 Skip to Q.12
I don't know.....3 Skip to Q.14

10. Why do you say that the pilot endorses the movie?

(12) I think if I was him and had this experience I would want others to know what happens

11. When you say the pilot endorses the movie, what do you mean by "endorses"?

(10) He's for people seeing what happened

12. Why do you say that the pilot does not endorse the movie?

13. When you say the pilot does not endorse the movie, what do you mean by "endorse"?

Bosnia Questionnaire
Gelb Consulting Group, Inc.
March 24, 2003

Location: Baltimore - Consumer Pulse of Baltimore

9. After seeing the program, do you think that the actual pilot endorses or doesn't endorse the movie that was advertised on the program you just saw? (*Rotate asking Q.9 and Q.9a*)

The actual pilot endorses the movie.....1 Ask Q.10 and 11
The actual pilot does not endorse the movie.....2 Skip to Q.12
I don't know.....3 Skip to Q.14

- ★ 9a. After seeing the program, do you think that the actual pilot doesn't endorse or does endorse the movie that was advertised on the program you just saw?

The actual pilot endorses the movie.....1 Ask Q.10 and 11
The actual pilot does not endorse the movie.....2 Skip to Q.12
I don't know.....3 Skip to Q.14

10. Why do you say that the pilot endorses the movie?

Because it was portrayed more accurately + so it really happened. He feels it was a good depiction of the story. /TA

11. When you say the pilot endorses the movie, what do you mean by "endorses"?

He agrees it is an accurate account and it is a good job of what really happened. It is not like a "Hollywood" made up version.

12. Why do you say that the pilot does not endorse the movie?

13. When you say the pilot does not endorse the movie, what do you mean by "endorse"?

Bosnia Questionnaire
Gelb Consulting Group, Inc.
March 24, 2003

Location: Baltimore – Consumer Pulse of Baltimore

9. After seeing the program, do you think that the actual pilot endorses or doesn't endorse the movie that was advertised on the program you just saw? (Rotate asking Q.9 and Q.9a)

The actual pilot endorses the movie.....1 Ask Q.10 and 11
The actual pilot does not endorse the movie2 Skip to Q.12
I don't know3 Skip to Q.14

- * 9a. After seeing the program, do you think that the actual pilot doesn't endorse or does endorse the movie that was advertised on the program you just saw?

The actual pilot endorses the movie.....① Ask Q.10 and 11
The actual pilot does not endorse the movie2 Skip to Q.12
I don't know3 Skip to Q.14

10. Why do you say that the pilot endorses the movie?

③ He gave out details and cooperated with the movie

11. When you say the pilot endorses the movie, what do you mean by "endorses"?

① endorses means agrees with his story

12. Why do you say that the pilot does not endorse the movie?

13. When you say the pilot does not endorse the movie, what do you mean by "endorse"?

Bosnia Questionnaire
Gelb Consulting Group, Inc.
March 24, 2003

Location: Baltimore - Consumer Pulse of Baltimore

9. After seeing the program, do you think that the actual pilot endorses or doesn't endorse the movie that was advertised on the program you just saw? (*Rotate asking Q.9 and Q.9a*)

The actual pilot endorses the movie.....1 Ask Q.10 and 11
The actual pilot does not endorse the movie.....2 Skip to Q.12
I don't know.....3 Skip to Q.14

- 9a. After seeing the program, do you think that the actual pilot doesn't endorse or does endorse the movie that was advertised on the program you just saw?

The actual pilot endorses the movie..... ☒ Ask Q.10 and 11
The actual pilot does not endorse the movie.....2 Skip to Q.12
I don't know.....3 Skip to Q.14

10. Why do you say that the pilot endorses the movie?

To show how rough it was for him and how wonderful it was that the others came for him

11. When you say the pilot endorses the movie, what do you mean by "endorses"?

that he okayed it

12. Why do you say that the pilot does not endorse the movie?

13. When you say the pilot does not endorse the movie, what do you mean by "endorse"?

Bosnia Questionnaire
Gelb Consulting Group, Inc.
March 24, 2003

Location: Los Angeles: Galleria at South Bay

2041

Interviewer: Re-screen participants on arrival to the research center.

A. Have you participated in a focus group discussion or research project with any research firm within the past 6 months?

- ☐ Yes *Thank and terminate*
☒ No
☐ Don't know/ Don't remember *Thank and terminate*

B. Do you, or does anyone in your household work for a marketing research firm, advertising agency, video store, or in the entertainment industry?

- ☐ Yes *Thank and terminate*
☒ No
☐ Don't know/ Don't remember *Thank and terminate*

C. Did you have the Discovery Channel available in your home in 2001?

- Yes (1) Ask Screener D
No 2 Not qualified - *Thank and terminate*

D. Have you seen one or more Discovery Channel program(s) in the past 3 months?

- Yes (1) Qualified - Continue with Q.1
No 2 Not qualified - *Thank and terminate*

Thank you for taking time to participate in this study. It will take about 90 minutes and you will receive \$40 after completing the interview for your time and travel expenses. Please come with me to the interview room.

I'd like to show you a one-hour program that was shown on the Discovery Channel. After you have seen it, I'd like to ask you a few questions. For any of the questions, it's OK to say if you don't know.

{Start the videotape}

GELB 669

EXHIBIT NO. 315
R. ASHMAN

Bosnia Questionnaire
Gelb Consulting Group, Inc.
March 24, 2003

Location: Los Angeles: Galleria at South Bay

9. After seeing the program, do you think that the actual pilot endorses or doesn't endorse the movie that was advertised on the program you just saw? (Rotate asking Q.9 and Q.9a)

The actual pilot endorses the movie.....17 Ask Q.10 and 11
The actual pilot does not endorse the movie.....2 Skip to Q.12
I don't know.....3 Skip to Q.14

- 9a. After seeing the program, do you think that the actual pilot doesn't endorse or does endorse the movie that was advertised on the program you just saw?

The actual pilot endorses the movie.....1 Ask Q.10 and 11
The actual pilot does not endorse the movie.....2 Skip to Q.12
I don't know.....3 Skip to Q.14

10. Why do you say that the pilot endorses the movie?

he speaks during the movie and
I've seen it in news reports on
what had happened

3
30

11. When you say the pilot endorses the movie, what do you mean by "endorses"?

He wants people to know what he
went through in being rescued and
the risk the pilot was taking

1

12. Why do you say that the pilot does not endorse the movie?

13. When you say the pilot does not endorse the movie, what do you mean by "endorse"?

GELB 607

Bosnia Questionnaire
Gelb Consulting Group, Inc.
March 24, 2003

Location: Los Angeles: Galleria at South Bay

9. After seeing the program, do you think that the actual pilot endorses or doesn't endorse the movie that was advertised on the program you just saw? (*Rotate asking Q.9 and Q.9a*)

The actual pilot endorses the movie.....1 Ask Q.10 and 11
The actual pilot does not endorse the movie2 Skip to Q.12
I don't know3 Skip to Q.14

- + 9a. After seeing the program, do you think that the actual pilot doesn't endorse or does endorse the movie that was advertised on the program you just saw?

The actual pilot endorses the movie.....① Ask Q.10 and 11
The actual pilot does not endorse the movie2 Skip to Q.12
I don't know3 Skip to Q.14

10. Why do you say that the pilot endorses the movie?

Because they are showing you what happened in the war, they are re-enacting the real story so that we can see what actually happened since we can't be there.

11. When you say the pilot endorses the movie, what do you mean by "endorses"?

He is giving his approval

12. Why do you say that the pilot does not endorse the movie?

13. When you say the pilot does not endorse the movie, what do you mean by "endorse"?

GELB 547

Consilia Questionnaire
Hb Consulting Group, Inc.
March 24, 2003

Location: Milwaukee - Grand Avenue Mall

4005

Interviewer: Re-screen participants on arrival to the research center.

A. Have you participated in a focus group discussion or research project with any research firm within the past 6 months?

☐ Yes

☒ No

Thank and terminate

☐ Don't know/ Don't remember

Thank and terminate

B. Do you, or does anyone in your household work for a marketing research firm, advertising agency, video store, or in the entertainment industry?

☐ Yes

☒ No

Thank and terminate

☐ Don't know/ Don't remember

Thank and terminate

C. Did you have the Discovery Channel available in your home in 2001?

Yes ① Ask Screener D

No 2 Not qualified - *Thank and terminate*

D. Have you seen one or more Discovery Channel program(s) in the past 3 months?

Yes ① Qualified - Continue with Q.1

No 2 Not qualified - *Thank and terminate*

Thank you for taking time to participate in this study. It will take about 90 minutes and you will receive \$40 after completing the interview for your time and travel expenses. Please come with me to the interview room.

I'd like to show you a one-hour program that was shown on the Discovery Channel. After you have seen it, I'd like to ask you a few questions. For any of the questions, it's OK to say if you don't know.

{Start the videotape}

GELB 987

EXHIBIT NO. 343

R. ASHMAN

Bosnia Questionnaire
Gelb Consulting Group, Inc.
March 24, 2003

Location: Milwaukee - Grand Avenue Mall

9. After seeing the program, do you think that the actual pilot endorses or doesn't endorse the movie that was advertised on the program you just saw? (Rotate asking Q.9 and Q.9a)

The actual pilot endorses the movie.....1 Ask Q.10 and 11
The actual pilot does not endorse the movie.....2 Skip to Q.12
I don't know.....3 Skip to Q.14

- 9a. After seeing the program, do you think that the actual pilot doesn't endorse or does endorse the movie that was advertised on the program you just saw?

The actual pilot endorses the movie.....1 Ask Q.10 and 11
The actual pilot does not endorse the movie.....2 Skip to Q.12
I don't know.....3 Skip to Q.14

10. Why do you say that the pilot endorses the movie?

Because he knew that showing that show would help someone out and also show them how to handle the situation. ~~and~~ why keep it a secret when you know. (A/E) No. 12

11. When you say the pilot endorses the movie, what do you mean by "endorses"?

That he let them know it was okay to show the struggles in how to make it out there. A/E He gave them permission to make this life story public. (A/E) No. 1

12. Why do you say that the pilot does not endorse the movie?

13. When you say the pilot does not endorse the movie, what do you mean by "endorse"?

Bosnia Questionnaire
Gelb Consulting Group, Inc.
March 24, 2003

Location: Milwaukee - Grand Avenue Mall

9. After seeing the program, do you think that the actual pilot endorses or doesn't endorse the movie that was advertised on the program you just saw? (Rotate asking Q.9 and Q.9a)

The actual pilot endorses the movie.....1 Ask Q.10 and 11
The actual pilot does not endorse the movie.....2 Skip to Q.12
I don't know.....3 Skip to Q.14

- 9a. After seeing the program, do you think that the actual pilot doesn't endorse or does endorse the movie that was advertised on the program you just saw?

The actual pilot endorses the movie.....1 Ask Q.10 and 11
The actual pilot does not endorse the movie.....2 Skip to Q.12
I don't know.....3 Skip to Q.14

10. Why do you say that the pilot endorses the movie?

Because he didn't say anything bad about the movie. He was neutral
E/A Nothing 30

11. When you say the pilot endorses the movie, what do you mean by "endorses"?

He favors or agrees with the movie.
He likes it. a/A Nothing 3

12. Why do you say that the pilot does not endorse the movie?

13. When you say the pilot does not endorse the movie, what do you mean by "endorse"?

Bosnia Questionnaire
Gelb Consulting Group, Inc.
March 24, 2003

Location: Milwaukee - Grand Avenue Mall

7. After seeing this program, do you think that the movie that was advertised is a Hollywood version of the actual pilot's real-life story, or is not a Hollywood version of the actual pilot's real-life story? (Rotate asking Q.7 and Q.7a)

Yes, it is1 Ask Q.8
No, it is not.....2 Ask Q.8
Don't know3 Skip to Q.9

- 7a. After seeing this program, do you think that the movie that was advertised is not a Hollywood version of the actual pilot's real-life story, or is a Hollywood version of the actual pilot's real-life story?

Yes, it is(1) Ask Q.8
No, it is not.....2 Ask Q.8
Don't know3 Skip to Q.9

If Respondent answered "Yes" or "No" in Q.7 ask Q.8

8. Why do you say that?

8
It is a dramatization of the actual event. (we) nothing

Bosnia Questionnaire
Gelb Consulting Group, Inc.
March 24, 2003

Location: Milwaukee - Grand Avenue Mall

9. After seeing the program, do you think that the actual pilot endorses or doesn't endorse the movie that was advertised on the program you just saw? (Rotate asking Q.9 and Q.9a)

The actual pilot endorses the movie.....(1) Ask Q.10 and 11
The actual pilot does not endorse the movie.....2 Skip to Q.12
I don't know.....3 Skip to Q.14

- 9a. After seeing the program, do you think that the actual pilot doesn't endorse or does endorse the movie that was advertised on the program you just saw?

The actual pilot endorses the movie.....1 Ask Q.10 and 11
The actual pilot does not endorse the movie.....2 Skip to Q.12
I don't know.....3 Skip to Q.14

10. Why do you say that the pilot endorses the movie?

Actual footage of what the plane³⁰
being shot down was part of the
movie (wp) nothing

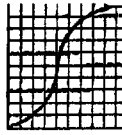
11. When you say the pilot endorses the movie, what do you mean by "endorses"?

~~the~~⁰⁹ Gave permission to run footage⁵
of the actual event (wp) nothing

12. Why do you say that the pilot does not endorse the movie?

13. When you say the pilot does not endorse the movie, what do you mean by "endorse"?

GELB 1173



LEO J. SHAPIRO AND ASSOCIATES, L.L.C., 468 EAST ILLINOIS STREET, CHICAGO, ILLINOIS 60611 / (312) 821-8111

DECLARATION OF PHILIP JOHNSON

I, Philip Johnson, state as follows:

I. INTRODUCTION

1. I am Chief Executive Officer of Leo J. Shapiro and Associates, Inc., a Chicago-based market research and consulting firm that conducts surveys.
2. I have been with this firm since 1971. Over the past 32 years, I have designed and supervised hundreds of surveys measuring consumer behavior, opinion, and beliefs concerning brands and products, employing a wide range of research techniques. I have given lectures before the American Bar Association (ABA), the Practising Law Institute (PLI), and the International Trademark Association (INTA) on the use of survey research in litigation. I am a member of the American Marketing Association (AMA), the American Association for Public Opinion Research (AAPOR), and the International Trademark Association (INTA). I have a B.S. degree in Psychology from Loyola University and an M.B.A. degree from the University of Chicago. A description of my background and a list of cases where I have offered survey evidence during the past five years are attached in the Appendix of this Declaration.

-2-

3. In April 2003, I was contacted by counsel for defendants, Twentieth Century Fox Film Corporation (Fox) and Discovery Communications, Inc. (Discovery), concerning a dispute that has arisen between the defendants and plaintiff, Scott O'Grady. This dispute involves the Fox motion picture "Behind Enemy Lines," and the advertisements for this film that aired during the Discovery Channel program, "Behind Enemy Lines: The Scott O'Grady Story." In this dispute, the plaintiff claims that showing advertising and promotional spots for Fox's "Behind Enemy Lines" motion picture during the Discovery Channel program falsely communicated to viewers that the Fox motion picture is based upon Scott O'Grady's real life story, and that Scott O'Grady endorsed the Fox film in some way.
4. Counsel informed me that Gabriel Gelb, of the Gelb Consulting Group, Inc., conducted a study on behalf of the plaintiff, Scott O'Grady, in an attempt to measure whether or not viewers of the November 2001 Discovery Channel program would falsely believe that the Fox film that was advertised during the "commercial space" is Scott O'Grady's real-life story. The Gelb study also attempts to determine whether or not viewers of the Discovery Channel program believe that O'Grady "endorses" the Fox film. Counsel asked me to review the report, and the underlying materials that were provided with the report, to determine whether or not it had any utility in this dispute. I agreed to conduct such a review and proceeded to do so.

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5. This report summarizes my general observations and opinions resulting from my review of the Expert Report of Gabriel Gelb, and a videotape copy of the Discovery Channel program that aired in November 2001. It is clear from the methodology and results described in this report that the Gelb study has no merit. At this point I have been furnished with a deposition transcript of Mr. Gelb, as well as copies of the actual surveys used in the Gelb study. I have not yet been furnished with an electronic database and coding materials that identify how each survey response was treated in the tabulations, or any other back up survey documentation which may form a basis for the opinions expressed in Mr. Gelb's report. I anticipate that I may have further opinions regarding the Gelb study once these materials have been made available to me.

II. DISCUSSION

6. The Gelb study completely fails to measure what it sets out to measure. The survey is defective in many ways, including having an unrepresentative survey universe, failing to incorporate any form of a control to measure error or bias, using leading and ambiguous question structures and sequences, and reporting conclusions that are not supported by the survey results..
7. The Gelb study universe is comprised of respondents who were largely recruited from pre-screened phone lists of individuals who had previously offered to participate in research focus groups in exchange for a cash payment.. Members of this database were contacted by an agent for the Gelb Consulting Group and asked if they would be willing to watch an action adventure video and then participate in an interview.. Potential respondents were offered a \$40 cash incentive up front with the offer to participate in the survey...
8. Those respondents who were willing to come to a research facility in exchange for this payment (as well as the promise of being entertained by an action adventure video) were subsequently qualified for inclusion based on having access to the Discovery Channel, and agreeing with a leading "screening" question that asked, *"Have you seen one or more Discovery Channel programs in the past three months?"* It is obvious from the construction of this leading question that the "correct" answer would be "Yes," if the respondent wanted to obtain the \$40 payment and participate in this offer that they had already agreed to..

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9. Moreover, even if potential respondents had actually seen one program on Discovery Channel in the past three months, it does not mean that they are regular viewers of the Discovery Channel or that they have any interest in the type of program of issue in this dispute. It is my understanding that viewers of cable television programs such as those on the Discovery Channel, which cover a diversity of topics, do not generally have equal interest in watching every program that is offered. For example, there is a type of Discovery Channel viewer who is attracted to the "military" style program that was shown in the Gelb survey. However, it is my understanding that a majority, roughly two-thirds, of viewers of this type of Discovery Channel programming are males, while the Gelb study includes a preponderance of females (54%) in the survey universe.
10. In effect, the universe utilized in the Gelb study bears little relationship to those who may have actually been exposed to the Discovery Channel program in question. In fact, when survey respondents were asked whether they had seen this program prior to being interviewed, only 37 respondents (18%) report that they thought they had. Even this small proportion is likely to overstate reality due to "false recall," and/or the false assumption that they may have seen it before because they responded that they watch Discovery Channel during the screening process.
11. The Gelb study fails to employ any form of control cell or control question in the survey. The purpose of a control is to measure what portion of the responses to the survey questions are artifacts of the survey design itself, the structure of the questions being asked, and any guessing or interpretation of the survey goals caused by the recruiting

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process and subsequent experience among those who were interviewed. A proper control group of respondents should have been shown a different stimulus, for example, another "military" themed program featuring the story of a specific character, and then asking the same set of questions to determine how many respondents would have given similar answers in response to any stimulus as a function of the study design. The use of leading, suggestive, and ambiguous questions in the Gelb survey further exacerbates the need for a control group to measure the impact of these biases in the responses of the survey participants.

12. Control cells or control questions are also necessary when conducting a study such as this so that a baseline can be established to measure pre-existing beliefs and attitudes concerning the topics being discussed in the key survey questions. For example, in the case of the Gelb study, a control measurement would be necessary to determine what proportion of respondents already believe that any military adventure movie would be inspired by some form of an "actual" event. Absent a control, no conclusions may be reached in the Gelb study about respondents' general opinions about military programs on the Discovery Channel, military action adventure movies, or what general beliefs they hold about "approval or endorsement."
13. It is my understanding that the plaintiff in this dispute, Scott O'Grady, appeared on other televised programming that was broadcast at about the same time as the Discovery Channel program. For example, the "Hot Ticket" program that aired on December 1, 2001, featured the plaintiff discussing his actual experience in Bosnia and contrasting it

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with the Fox movie, "Behind Enemy Lines." O'Grady's representations on that program would provide a control measure of what proportion of viewers believe that "he endorsed the Fox film and that it was his story," as he contends the Discovery Channel program does with its Fox movie advertisements. This program could have been incorporated into the Gelb study as a control stimulus to gauge how many respondents would have given similar answers to the survey questions, after exposure to this "non-infringing" program.

14. Another possible approach to creating a "control" stimulus may have been to use the basic documentary program, which originally aired on the BBC and was produced with Scott O'Grady's permission, without the Discovery Channel promotional materials that were created to showcase this program or the advertising messages for the Fox film that were broadcast when Discovery Channel aired the program. To provide comparability, one would need to add promotional materials for other Discovery Channel programs, as well as advertising messages for other similar movies (e.g., Blackhawk Down). In any case, the Gelb study utilizes no control to measure how respondents would have answered the survey questions based simply on the survey design, the specific questions asked, or exposure to the O'Grady documentary, which he did, in fact, "endorse."
15. The Gelb survey questions are leading and suggestive in construction, while ambiguous in context. For example, the survey begins by asking respondents (Question 1), "*Had you seen this program before or not?*" This is followed by Question 2, "*In your opinion, after seeing this program, did the program tell about an event that actually took place or not?*" Among the survey respondents, 8% said "No" or that they "Don't know" if it was

about an actual event, suggesting they had little understanding of what they had just seen. The balance (92%) say "Yes," but there is no way of knowing what they are referring to. For instance, they could simply be saying that the program talked about an actual event such as the war in Bosnia.

16. In Question 3, Gelb asks respondents, *"So far as you recall, did the actual pilot who was shot down in enemy territory appear in any part of this one-hour program?"* This is a leading question that is full of information that the respondent may or may not have recalled on their own, without being aided by the question. It does, at the minimum, suggest that there was *"an actual pilot,"* who was *"shot down in enemy territory,"* who did appear in *"part of this one-hour program."* Instead of using this type of leading question structure that prompts respondents, the accepted methodological practice is to ask an open-ended question that allows the respondent to answer in their own words, or ask a series of questions such as, *"What was the program you saw about? PROBE: What else do you recall in this program?"*
17. The Gelb study continues to use leading question sequences while failing to offer a balanced set of response choices to the respondent. For example, Question 4 asks, *"Do you recall the pilot's name? IF YES: What was the pilot's name?"* Then follows Question 5, *"Do you recall whether or not a movie was advertised on this program?"* And then Question 6, *"IF YES: What was the name of the movie that was advertised?"* These questions are structured with a demand effect by failing to pose alternative choices, such as, *"do you or don't you."* It also has a "yea saying" effect that drives respondents

-9-

to agree with such a positively stated question and respond "Yes" even if they do not have an opinion or do not understand the question. These failings are exacerbated by the lack of a proper control cell that could measure the error caused by such questioning. The results shown in the Gelb survey indicate that 89% of respondents agreed that a movie was advertised, and 84% of respondents correctly identified "Behind Enemy Lines" as the movie advertised.

18. Inexplicably, the Gelb survey proceeds to ask Question 7 of all respondents, even of those who did not recall that the Fox movie "Behind Enemy Lines" was advertised:
"After seeing this program, do you think that the movie that was advertised is a Hollywood version of the actual pilot's real-life story, or is not a Hollywood version of the actual pilot's real-life story?" This central question in the Gelb study is so poorly designed and constructed, and the alternatives are so unclear and ambiguous, that no conclusions can be drawn from the results. For instance, the "choices" forced on the respondent assume the respondent has a belief about the *"actual pilot's real-life story"* when it is uncertain whether respondents had thought about it before being asked the question. It is also impossible to decipher what the alternative choices mean given the introduction of the term *"Hollywood version."*
19. The term "Hollywood" as an adjective is generally used to describe events that are made-up or fictional. At the least, the choice of the verbiage, *"Hollywood version of the actual pilot's real-life story"* appears to be a textbook example of an oxymoron. In such a situation, without any control cell to determine how a respondent would answer such a

-10-

question, no conclusions can be drawn from the results of this question. Even the follow-up in Question 8, "*Why do you say that [this movie is a Hollywood version of the actual pilot's real-life story]?*" demonstrates this ambiguity. For example, the most frequent response listed in the table provided in the Gelb report suggests that one out of four (25%) of those respondents who agreed that it was a "*Hollywood version*," said that this was because "*events in the movie were similar to a real story but more far-fetched*."... This response suggests that the survey participant recognizes that it is not Scott O'Grady's story, but it is a similar story, a position that is consistent with the defendant's claim in this dispute.

20. The creation of this confusing and ambiguous question apparently occurred as a "remedy" when a somewhat more appropriate question was tested in a preliminary survey (or pre-test), which asked, "*After seeing this program, do you think that the movie which was advertised is or is not the actual pilot's real life story?*" While sharing many of the leading characteristics and tendency to inform the respondent as the later version, this question notably does not contain the words "Hollywood version." Without this confusing use of "Hollywood version" in the key survey question, just 32% of the "pre-test" respondents replied "yes." This result contrasts sharply with the results obtained by the "altered" version of this question where 70% answered "yes." In effect, these differences suggest that respondents understand quite clearly that the movie is not the "O'Grady story" but rather is simply a Hollywood movie that is only loosely related to or "inspired by" this story. In his deposition testimony, Mr. Gelb reports that he made this

-11-

change to the key survey question because it was not working the way he would have liked.

21. The Gelb study then continues to pursue this suggestive line of questioning, irrespective of whether the respondent had any views, by asking Question 9, *"After seeing the program, do you think the actual pilot endorses or doesn't endorse the movie advertised on the program you just saw?"* This is another poorly constructed question that suggests that the *"actual pilot"* should have a position or stance about the movie; i.e., endorse/does not endorse the movie advertised. This comes right after the previous suggestive questioning sequence that informed survey respondents that the movie may be a *"Hollywood version"* of the *"actual pilot's real-life story."*
22. At this juncture, the question series may have confused respondents into thinking that the survey questions referred to the Discovery Channel program (which had been described to them as an action-adventure video when they were recruited), rather than to the Fox movie. For example, 22% of those who agreed with the idea that the pilot endorses the film say it is because *"he was talking on the program,"* or 3% of respondents said *"(It) showed true life of O'Grady with movie clips,"* and 2% of respondents said *"He'd like people to see what happened, not the Hollywood version."* These responses suggest that when they answered this survey question, respondents may have been referring to the Discovery Channel program, or scenes contained within the Discovery Channel program, and not the Fox movie. In addition, the structure of Question 9 is highly speculative and encourages guessing. This kind of question may result in respondents conducting a

-12-

"mental coin toss," where about half (49%) of the respondents agree that the pilot endorses the movie, and the other half (51%) report either that the pilot does not endorse the movie (26%), or that they do not know (25%).

21. By the end of the Gelb study, respondents have been exposed to a constant barrage of the following terms: *"the program," "the actual pilot," "the pilot's real-life story," "the movie," "the movie advertisement,"* and *"a Hollywood version."* In addition, the questions in the Gelb study repeat the phrase "advertised on the program," suggesting that the advertisements are contained in the Discover Channel program itself, rather than occurring in the "commercial space" which interrupts the program. The cumulative impact of this confusion on the survey respondents is unknown. Again, without a measure of how respondents would answer such speculative questions when exposed to a control stimulus, no conclusions can be drawn from these responses other than the fact that they appear to reflect guessing behavior.

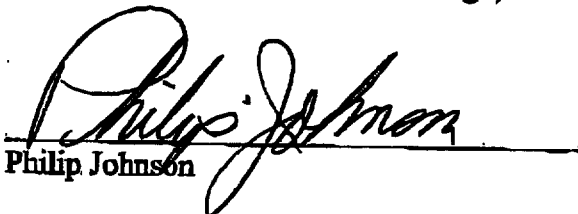
-13-

III. CONCLUSIONS

22. Overall, the Gelb study does not include the proper universe, does not incorporate a control group or even a single control question to measure error, uses biased and leading questions, and reaches conclusions that are not supported by the survey results.
23. Based on my review of this study, no valid conclusions can be drawn about whether persons who would have actually been exposed to the Discovery Channel program that aired in November of 2001, and that contained, among other advertising and promotional materials, advertisements for the Fox movie, "Behind Enemy Lines," would have been falsely led to believe that the Fox movie was in fact the true story of Scott O'Grady, or that he endorsed the Fox movie.
24. The work required in preparing this declaration is covered by a billing of \$24,500. Additional time required for trial testimony or deposition will be billed at a rate of \$5,000 per day, plus expenses.

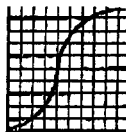
Pursuant to 28 U.S.C., Section 1746, I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on July 11, 2003 in Chicago, Illinois.


Philip Johnson

APPENDIX

- Philip Johnson Curriculum Vitae
- Recent Cases Where Philip Johnson Testified



LEO J. SHAPIRO AND ASSOCIATES, L.L.C., 455 EAST ILLINOIS STREET, CHICAGO, ILLINOIS 60611 / (312) 321-8111

PHILIP JOHNSON

CURRICULUM VITAE

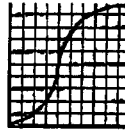
Philip Johnson is the Chief Executive Officer of Leo J. Shapiro and Associates, a Chicago-based market research and behavioral consulting company. Mr. Johnson has been with this firm since 1971 and has held a number of positions. In recent years, he has concentrated his efforts in the areas of study design and the development of innovative research techniques.

Over the past years, Mr. Johnson has designed and supervised hundreds of surveys measuring consumer behavior and opinion, employing a wide range of research techniques. His area of expertise is in the use of survey research as a tool in litigation, including jury selection and trademark disputes.

Part of Mr. Johnson's training has been through working with Dr. Leo J. Shapiro, the Founder of the company; the late Dr. Philip M. Hauser, a former Director of the U. S. Census Bureau; and the late Dr. Hans Zeisel, who made significant contributions in the application of social science to the solution of legal questions.

Mr. Johnson has given lectures before the American Bar Association (ABA) and the Practising Law Institute (PLI) on the use of survey research in litigation. He is a member of the American Marketing Association (AMA), the American Association for Public Opinion Research (AAPOR), and the International Trademark Association (INTA).

Mr. Johnson has a B.S. degree in Psychology from Loyola University and a M.B.A. degree from the University of Chicago.



LEO J. SHAPIRO AND ASSOCIATES, L.L.C., 455 EAST ILLINOIS STREET, CHICAGO, ILLINOIS 60611 / (312) 321-8111

**RECENT CASES WHERE PHILIP JOHNSON
TESTIFIED OR OFFERED SURVEY EVIDENCE...**

FEBRUARY 2003	GATEWAY, INC. VS. COMPANION PRODUCTS, INC. United States District Court for the District of South Dakota (Southern Division) Likelihood of Confusion
DECEMBER 2002	ORACLE CORPORATION AND ORACLE INTERNATIONAL CORPORATION VS. LIGHT READING, INC. United States District Court for the Northern District of California (San Francisco Division) Likelihood of Confusion and Fame
NOVEMBER 2002	COMPUTER ACCESS TECHNOLOGY CORPORATION VS. CATALYST ENTERPRISES, INC. United States District Court for the Northern District of California (Oakland Division) Likelihood of Confusion
OCTOBER 2002	GARY M. KAWESCH, M.D., INC. VS. ANTOINE L. GARABET, M.D., INC. AND REFRACTIVE ASSOCIATES, INC. United States District Court for the Northern District of California (San Jose Division) Likelihood of Confusion
JUNE 2002	GIANT BRANDS, INC., AND GIANT OF MARYLAND, L.L.C. VS. GIANT EAGLE, INC., AND PHOENIX INTANGIBLES HOLDING COMPANY. United States District Court for the District of Maryland Likelihood of Confusion
MARCH 2002.	MICHAEL A. WAUL VS. CIRCUIT CITY STORES, INC., ET AL. Superior Court of the State of California for the County of San Francisco False Advertising
FEBRUARY 2002	MICROSOFT CORPORATION VS. LINDOWS.COM, INC. United States District Court for the Western District of Washington Likelihood of Confusion

FEBRUARY 2002	FORD MOTOR COMPANY VS. FACTORY. FIVE RACING, INC. United States District Court for the District of Massachusetts Likelihood of Confusion and Secondary Meaning
DECEMBER 2001	CLAIROL, INC. VS. XTREME COLOR, INC. United States District Court for the Southern District of New York Likelihood of Confusion
AUGUST 2001	BIG O TIRES, INC. VS. BIGFOOT 4X4, INC., ET AL. United States District Court for the District of Colorado Likelihood of Confusion
MAY 2001	HEALTHPOINT, LTD. VS. STRATUS PHARMACEUTICALS, INC. United States District Court for the Western District of Texas Likelihood of Confusion
MARCH 2001	CHATTANOGA MANUFACTURING, INC. VS. NIKE, INC., MICHAEL JORDAN United States District Court for the Northern District of Illinois (Eastern Division) Likelihood of Confusion
OCTOBER 2000	MOLDEX METRIC, INC. VS. AEARO COMPANY. United States District Court for the Central District of California Likelihood of Confusion
AUGUST 2000	CASTROL, INC. VS. PENNZOIL COMPANY, ET AL. United States District Court for the District of New Jersey False Advertising
MAY 2000	WORLDWIDE TRAVEL PLACE, INC. VS. POWERMOUNT DEVELOPMENT, 1 TRAVEL, AND RICHARD ATTENBERG United States District Court for the Central District of California Genericness
MARCH 2000	PHARMACIA & UPJOHN COMPANY VS. SOLVAY, MERCK AND COMPANY, GLAXO WELLCOME Food and Drug Administration Likelihood of Confusion

JUNE 1999	HEWLETT-PACKARD VS. NU-KOTE INTERNATIONAL United States District Court for the Northern District of California (San Jose Division) Likelihood of Confusion
JANUARY 1999	NATIONAL GUARDIAN LIFE INSURANCE VS. THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA United States District Court for the Western District of Wisconsin Likelihood of Confusion
NOVEMBER 1998	BIG TEN CONFERENCE, INC. VS. BIG TEN ENTERPRISES United States District Court for the Eastern District of Michigan Likelihood of Confusion
AUGUST 1998	THE CIT GROUP, INC. VS. CITICORP. United States District Court for the District of New Jersey Likelihood of Confusion
AUGUST 1998	BLACK & DECKER VS. PROTECH United States District Court for the Eastern District of Virginia Likelihood of Confusion and Secondary Meaning
DECEMBER 1997	ALBERT NIPON AND AMERICAN POP MARKETING GROUP, INC. VS. THE LESLIE FAY COMPANIES, INC., ET. AL. United States Bankruptcy Court for the Southern District of New York Likelihood of Confusion
SEPTEMBER 1997	FRANKLIN RESOURCES, INC. VS. FRANKLIN CREDIT MANAGEMENT CORPORATION United States District Court for the Southern District of New York Likelihood of Confusion
APRIL 1997	INTEL CORPORATION VS. ADVANCED MICRO DEVICES, INC. AND CYRIX CORPORATION United States District Court for the District of Delaware Genericness
APRIL 1997	THE COCA-COLA COMPANY VS. R.J. CORR United States District Court for the Northern District of Illinois Likelihood of Confusion

MARCH 1997	MASTERCARD INTERNATIONAL, INC. VS. AMERICAN EXPRESS COMPANY, INC. AND ADVANTA CORPORATION United States District Court for the Northern District of California Likelihood of Confusion
MARCH 1997	KENDALL-JACKSON VS. GALLO United States District Court for the Northern District of California Likelihood of Confusion
JANUARY 1997	BABSON BROS. CO. VS. THE COCA-COLA COMPANY United States District Court for the Northern District of Illinois Likelihood of Confusion
JUNE 1996	THE STANLEY WORKS VS. ARROW FASTENER COMPANY United States District Court for the Southern District of New York False Advertising and Unfair Competition
MAY 1996	LEXINGTON FURNITURE VS. VAUGHAN-BASSETT United States District Court for the Middle District of North Carolina Secondary Meaning
APRIL 1996	HINCKLEY & SCHMITT, INC. VS. ABSOPURE WATER COMPANY United States Patent and Trademark Office Trademark Trial and Appeal Board Likelihood of Confusion
FEBRUARY 1996	MARICOPA FOUNDATION FOR MEDICAL CARE VS. FOUNDATION HEALTH CORPORATION United States District Court for the District of Arizona Likelihood of Confusion

Appendix II

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF TEXAS
3 TEXARKANA DIVISION
4
5

6 SCOTT O'GRADY)

7 Plaintiff,)

8 vs.)

CIVIL ACTION NO. 502CV173

9 TWENTIETH CENTURY FOX)
10 FILM CORPORATION, and)
11 DISCOVERY COMMUNICATIONS,)
12 INC.,)

Defendants.)

13 VIDEOTAPED DEPOSITION UPON ORAL EXAMINATION OF
14 PATRICK BYERS
15

16
17 **COPY**
18

19 July 11, 2003

20 11:05 a.m.

21 1501 Fourth Avenue, Suite 2600

22 Seattle, Washington
23
24

25 Reported by Alvena Burton, CCR

DEPOSITION OF PATRICK BYERS, 7/11/03

5

1 MS. PENDLETON: Constance M. Pendleton of
2 Davis Wright Tremaine representing Discovery
3 Communications, Inc.

4 MR. HASTINGS: Scott Hastings from Locke,
5 Liddell & Sapp representing the plaintiff Scott
6 O'Grady.

7
8 PATRICK BYERS, being first duly sworn
9 by the Notary Public to tell
10 the whole truth, was
11 examined and testified as
12 follows:

13
14 (Deposition Exhibit Nos. 383 and 384 pre-marked.)

15
16 E X A M I N A T I O N

17 BY MR. SCOTT:

18 Q. Mr. Byers, can you state your full name for the
19 record, please.

20 A. Patrick Michael Byers.

21 Q. Okay. And your address is -- well, your business
22 address is 10655 Northeast Fourth Street, Suite 104,
23 Bellevue, Washington 98004?

24 A. Correct. That's correct.

25 Q. Have you ever been deposed before?

DEPOSITION OF PATRICK BYERS, 7/11/03

17

1 Q. Okay.

2 A. Is my -- that's my impression.

3 Q. Just your impression, yeah.

4 A. My impression.

5 Q. That's all I'm asking.

6 A. Right.

7 Q. I'm not asking for anything more. At the time of --
8 well, let me back up. You mentioned that you've
9 seen -- you saw the DCI documentary the first time
10 it aired.

11 A. Uh-huh.

12 Q. Did you have an opportunity to talk to Scott O'Grady
13 about your impressions of that program after you saw
14 it the first time?

15 A. If I did, I don't recall.

16 Q. Okay. Have you seen the program at any point in its
17 entirety since that first showing?

18 A. Not in its entirety, but I occasionally like anybody
19 when channel surfing all of a sudden I'll happen
20 upon it, and I'll realize, oh, there's Scott's
21 documentary. It's on again. And, you know, but
22 I've seen it so I don't continue on it.

23 Q. Sure. Do you recall ever being contacted by Scott
24 O'Grady to record the program for any reason?

25 A. Yes. When the -- this was going to be airing with

DEPOSITION OF PATRICK BYERS, 7/11/03

44

C E R T I F I C A T E

STATE OF WASHINGTON)
COUNTY OF KING) ss.

I, Alvena L. Burton, a Notary Public in and for the State of Washington, do hereby certify:

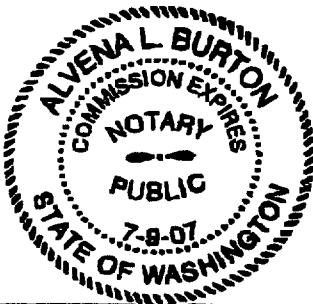
That the foregoing deposition was taken before me at the time and place therein set forth;

That the itinerary was by me first duly sworn to testify to the truth, the whole truth, and nothing but the truth; and that the testimony of the itinerary and all objections made at the time of the examination were recorded stenographically by me, and thereafter transcribed under my direction;

That the foregoing transcript is a true record of the testimony given by the itinerary and of all objections made at the time of the examination, to the best of my ability.

I further certify that I am in no way related to any party to this matter nor to any of counsel, nor do I have any interest in the matter.

Witness my hand and seal this 19th of July, 2003.



Alvena L. Burton
ALVENA L. BURTON
Notary Public in and for
the State of Washington,
residing at Seattle
Commission expires 7/9/07

Appendix III

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

SCOTT O'GRADY

Plaintiff,

vs.

CIVIL ACTION NO. 502CV173

TWENTIETH CENTURY FOX
FILM CORPORATION, and
DISCOVERY COMMUNICATIONS,
INC.,

Defendants.

VIDEOTAPED DEPOSITION UPON ORAL EXAMINATION OF
BILL FLANAGAN

COPY

July 11, 2003

9:06 a.m.

1501 Fourth Avenue, Suite 2600

Seattle, Washington

Reported by Alvena Burton, CCR

DEPOSITION OF BILL FLANAGAN, 7/11/03

5

1 MS. PENDLETON: Constance Pendleton of
2 Davis Wright Tremaine for defendant Discovery
3 Communications, Inc.

4 MR. HASTINGS: Scott Hastings from Locke,
5 Liddell & Sapp for the plaintiff Scott O'Grady.

6
7 BILL FLANAGAN, being first duly sworn
8 by the Notary Public to tell
9 the whole truth, was
10 examined and testified as
11 follows:

12
13 (Deposition Exhibit Nos. 380 and 381 pre-marked.)
14

15 EXAMINATION

16 BY MR. SCOTT:

17 Q. Can you please state your full name for the record.

18 A. William J. Flanagan.

19 Q. And, Mr. Flanagan, are you here pursuant to a
20 subpoena --

21 A. Correct.

22 Q. -- and deposition notice?

23 A. I am.

24 Q. I'm going to tender to you what's been marked as
25 Deposition Exhibit No. 380. I want you to take a

DEPOSITION OF BILL FLANAGAN, 7/11/03

28

1 Scott O'Grady said that. What is that that you're
2 referring to?

3 A. Well, I'm referring more to the tape of the movie,
4 and I didn't know -- that's what I'm saying. I
5 don't know if -- when I taped that I really wasn't
6 paying attention to it.

7 Q. Okay.

8 A. So I just caught phrases while I was walking
9 through, and I thought, well, I better record that
10 and that type of thing. So I didn't really sit down
11 and see all of it myself.

12 Q. Okay.

13 A. Okay.

14 Q. Did you ever watch the tape that you recorded prior
15 to sending it to Scott O'Grady?

16 A. I don't -- I don't recall.

17 Q. Are you able to tell me now as we sit here what
18 language or whatever comments that were made on the
19 tape that you recorded that troubled you?

20 A. No. I mean, if I saw it again I could, but it would
21 have to do that to refresh my memory.

22 Q. Sure. In your conversations with Scott O'Grady
23 following your taping of the program, did he ever
24 comment on what his impressions were of the program?

25 A. Of what program?

DEPOSITION OF BILL FLANAGAN, 7/11/03

55

C E R T I F I C A T E

STATE OF WASHINGTON)

SS.

COUNTY OF KING

I, Alvena L. Burton, a Notary Public in and for the
State of Washington, do hereby certify:

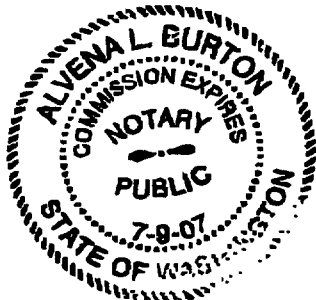
That the foregoing deposition was taken before me at the time and place therein set forth;

That the itinerary was by me first duly sworn to testify to the truth, the whole truth, and nothing but the truth; and that the testimony of the itinerary and all objections made at the time of the examination were recorded stenographically by me, and thereafter transcribed under my direction;

That the foregoing transcript is a true record of the testimony given by the itinerary and of all objections made at the time of the examination, to the best of my ability.

I further certify that I am in no way related to any party to this matter nor to any of counsel, nor do I have any interest in the matter.

Witness my hand and seal this 18th of July, 2003.



ALVENA L. BURTON
Notary Public in and for
the State of Washington,
residing at Seattle
Commission expires 7/9/07